CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 24, 159 and 174

(T.D. 99–75)

RIN 1515–AB76

INTEREST ON UNDERPAYMENTS AND OVERPAYMENTS OF CUSTOMS DUTIES, TAXES, FEES AND INTEREST

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim rule.

SUMMARY: This document conforms the Customs Regulations to existing statutory provisions and judicial precedent regarding the assessment of interest due to underpayments or overpayments to Customs of duties, taxes and fees pertaining to imported merchandise, including interest thereon. The majority of the conforming changes reflect the terms of section 505 of the Tariff Act of 1930 (19 U.S.C. 1505), as amended by section 642(a) within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. Under that statute, interest accrues initially from the date the duties, taxes, fees and interest are deposited with Customs in the case of overpayments, or are required to be deposited with Customs in the case of underpayments, but in either case not beyond the date of liquidation or reliquidation of the applicable entry or reconciliation. Also under the statute and applicable judicial precedent, all bills issued by Customs for underpayments of duties, taxes, fees and interest are due within 15 or 30 days of issuance. In addition, the document conforms the Customs Regulations to other changes to 19 U.S.C. 1505 and to section 321 of the Tariff Act of 1930 (19 U.S.C. 1321) regarding interest that were made by sections 2(a) and 3(a)(12) of the Miscellaneous Trade and Technical Corrections Act of 1996.

DATES: Interim rule effective October 20, 1999. Comments must be received on or before December 20, 1999.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings,

U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Robert Reiley, Financial Management Division (202–927–1504).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Present regulatory provisions

The regulatory provisions amended by this document are as follows:

Section 24.1 of the Customs Regulations (19 CFR 24.1) sets forth general procedures governing the collection of "Customs duties, taxes, and other charges," including the permissible methods of payment.

Section 24.3 of the Customs Regulations (19 CFR 24.3) sets forth general provisions regarding the rendering and payment of bills or accounts for money due the United States and the issuance of receipts therefor. Paragraph (e) of that section provides that (1) a bill for increased or additional duties determined to be due upon a liquidation or reliquidation is due 15 days from the date of such liquidation or reliquidation and (2) all other bills are due and payable upon the bill date appearing on the bill.

Section 24.3a of the Customs Regulations (19 CFR 24.3a) contains detailed provisions regarding Customs bills for supplemental duties (increased or additional duties assessed upon liquidation or reliquidation), reimbursable services, and miscellaneous amounts (bills other than duties, taxes, reimbursable services, liquidated damages, fines, and penalties), including interest thereon.

Section 24.11 of the Customs Regulations (19 CFR 24.11) concerns the issuance of bills for "increased or additional duties or taxes found due upon liquidation" and provides for issuance of such bills to the importer of record or, in certain circumstances, to the actual owner.

Section 24.25 of the Customs Regulations (19 CFR 24.25) concerns statement processing and automated clearinghouse filing and payment procedures and, in the second sentence of paragraph (a), refers to a single payment of "duties, taxes and fees."

Section 24.36 of the Customs Regulations (19 CFR 24.36) concerns refunds of excessive duties or taxes, and paragraph (a) thereof specifically provides for preparation of a refund "[w]hen it is found on liquidation or reliquidation of an entry that a refund of excessive duties or taxes, or both, is due."

Section 159.6 of the Customs Regulations (19 CFR 159.6) concerns the treatment by Customs of differences of less than $20 and $20 or more, between estimated deposits and amounts assessed on liquidation. This section specifically refers in these contexts to "duties, fees, and taxes" or to "duties and fees and internal revenue taxes."

Section 174.11 of the Customs Regulations (19 CFR 174.11) sets forth the matters that may be the subject of an administrative protest. Paragraph (c) of that section specifically refers to "charges or exactions" of whatever character within the jurisdiction of the Secretary of the Treasury.

Section 174.12 of the Customs Regulations (19 CFR 174.12) sets forth the procedures for filing a protest. Paragraph (a)(2) of that section provides that a protest may be filed by any person "paying any charge or exaction."

Customs Modernization statutory changes

The Customs Modernization provisions contained in Title VI of the North American Free Trade Agreement Implementation Act ("the Act"), Public Law 103–182, 107 Stat. 2057, included, in section 642(a), an extensive amendment of section 505 of the Tariff Act of 1930 (19 U.S.C. 1505). Prior to this amendment, section 505 consisted of three subsections covering the deposit of estimated duties (subsection (a)), the collection of increased or additional duties and the refund of excess duties deposited as determined on a liquidation or reliquidation (subsection (b)), and the due date for duties determined to be due upon liquidation or reliquidation, delinquency, and interest on delinquent duty payments (subsection (c)). Section 505, as amended by section 642(a) of the Act, now contains the following provisions:

1. Subsection (a) of amended section 505 requires the importer of record to deposit with Customs, at the time of making entry or at such later time as the Secretary of the Treasury may prescribe by regulation, the amount of duties "and fees" estimated to be payable on the entry. In addition, subsection (a) now provides (1) that the regulations prescribed by the Secretary may provide that estimated duties and fees shall be deposited before or at the time an import activity summary statement is filed and (2) that if an import activity summary statement is filed, the estimated duties and fees shall be deposited together with interest, at a rate determined by the Secretary of the Treasury, accruing from the first date of the month the statement is required to be filed until the date such statement is actually filed. (An import activity summary statement is a filing procedure provided for in section 484 of the Tariff Act of 1930, as amended [19 U.S.C. 1484], and was added by section 637 (a) of the Act to permit the filing of a single statement, covering entry or warehouse withdrawal transactions made during a calendar month, within such time period as prescribed by the Secretary of the Treasury by regulation but not later than the 20th day following such calendar month. Implementation of the import activity summary statement procedure will be the subject of a separate regulatory action and thus is not dealt with in this document.) Thus, in order to avoid a potential conflict with the import activity summary statement procedure, subsection (a), as amended, no longer contains a 30-day limitation on the authority of the Secretary of the Treasury to prescribe by regulation for the deposit of estimated duties after the date of entry.

2. Subsection (b) of amended section 505 requires Customs to collect any increased or additional duties "and fees due, together with interest thereon," and to "refund any excess moneys deposited, together with interest thereon," as determined on a liquidation or reliquidation. In addition, subsection (b) now provides (1) that duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for payment and (2) that refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation. Thus, in addition to the inclusion of new references to the collection of fees and interest, to the refund of excess "moneys" (which would include fees) and interest thereon, and to a due date based on the issuance of a bill, section 505, as amended, prescribes a specific time limit for the payment of refunds and no longer provides that duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation (see also the discussion of subsection (d) below).

3. Subsection (c) of amended section 505 is essentially new and provides (1) that interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary of the Treasury, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation and (2) that interest on excess moneys deposited shall accrue, at a rate determined by the Secretary of the Treasury, from the date the importer of record deposits estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. (Reconciliation is a procedure provided for in section 484 of the Tariff Act of 1930, as amended [19 U.S.C. 1484], and was added by section 637(a) of the Act to allow elements of an electronic entry summary or electronic import activity summary statement [other than those elements related to the admissibility of the merchandise], if undetermined at the time the summary or statement is filed, to be provided to Customs at a later time. Reconciliation will be implemented by separate regulatory action and thus is not substantively addressed in this document.) Thus, the importer of record is liable for interest on underpaid amounts from the date those amounts should have been paid to Customs, and, conversely, the importer of record is entitled to interest on refunds of payments made to Customs in excess of the amount properly due.

4. Finally, subsection (d) of amended section 505 provides (1) that if duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b), any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary of the Treasury, from the date of liquidation or reliquidation until the full balance is paid and (2) that no interest shall accrue during the 30-day period in which payment is actually made. In addition, subsection (d) of amended section 505 reflects the terms of present § 24.3a(c)(3) of the regulations in that it pro-

vides for a 30-day period for payment both before and once a delinquency occurs, during which period no additional interest (that is, on any outstanding principal amount, plus interest thereon) will accrue so long as full payment of the amount outstanding is made during that current 30-day period. Thus, section 505 no longer allows for delinquency and interest accrual only after 45 days following liquidation or reliquidation. This is because the statutory delinquency period is now 30 days and because under the statute initial interest accrual on underpayments runs from the date of required deposit of moneys rather than only when a delinquency has occurred.

Customs has determined that the changes to section 505 effected by section 642(a) of the Act as described above require a number of conforming changes to the provisions of §§ 24.1, 24.3, 24.3a, 24.11, 24.25 and 24.36 of the regulations. These changes, which are explained in more detail below, concern principally the inclusion of references to the following: the collection or deposit of (estimated) fees and interest; the collection of increased or additional fees; the refund of excess fees deposited; the accrual of interest on underpaid and overpaid duties, fees and interest from the date of required (including actual) deposit to the date of liquidation or reliquidation and the collection or refund of such accrued interest; and the 30-day due date periods for payments or refunds of underpaid or overpaid duties, fees and interest as determined on liquidation or reliquidation. In addition, some of these regulatory provisions, as well as §§ 174.11 and 174.12 of the regulations, are in need of additional wording changes, involving principally the addition of references to "interest" or "taxes" or "refunds," in order to conform the regulatory texts to the principles reflected in applicable judicial decisions; these changes are also explained in more detail below.

Additional statutory changes regarding interest

Subsequent to the changes to section 505 effected by section 642(a) of the Act as discussed above, additional statutory changes regarding interest were enacted as part of the Miscellaneous Trade and Technical Corrections Act of 1996 ("the Miscellaneous Act"), Public Law 104–295, 110 Stat. 3514. These statutory changes, which require conforming regulatory changes, were as follows:

1. Section 2(a) of the Miscellaneous Act amended section 505(c) to provide that, in the case of a claim under 19 U.S.C. 1520(d) (that is, a NAFTA post-importation claim for a refund of duty), interest on the excess money deposited shall accrue from the date on which the claim is made; under section 2(b) of the Miscellaneous Act, the section 2(a) amendment applies to claims made on or after June 7, 1996. Since this statutory amendment relates only to interest on excess deposits, Customs believes that it should be reflected in the § 24.36 refund provisions.

2. Section 3(a)(12) of the Miscellaneous Act amended section 321(a) of the Tariff Act of 1930 (19 U.S.C. 1321(a)) by the addition of several references to "interest." The addition of these references extends the

authority of the Secretary of the Treasury to include interest in determining what is a *de minimis* amount when providing by regulation for waiving the collection of *de minimis* amounts on entered merchandise and for disregarding *de minimis* differences between the total estimated deposit or tentatively assessed amount and the total amount actually accruing on an entry of merchandise; under section 3(b) of the Miscellaneous Act, the section 3(a)(12) amendments apply as of December 8, 1993. Customs believes that the statutory amendment pertaining to the disregarding of differences between the total estimated deposit or tentatively assessed amount (that is, of duties, fees, and taxes) and the total amount (of duties, fees, taxes, and interest) actually accruing (which is normally determined upon liquidation of the entry) should be reflected in § 159.6 of the regulations which implements this aspect of the section 321(a) provisions.

EXPLANATION OF AMENDMENTS

The specific regulatory amendments set forth in this document are explained in more detail below.

Section 24.1

The amendments to § 24.1 involve the addition of references to "fees" and "interest" in various paragraphs under the section. This is simply intended to reflect the inclusion of these terms in the text of section 505 as amended by section 642(a) of the Act. Since § 24.1 sets forth general rules for collection (including payment method) of funds due Customs and thus covers both initial payments and supplemental payments pursuant to a bill issued by Customs, the added "interest" references are intended to cover (1) any interest that may be initially due on estimated duties and fees under the import activity summary statement procedure mentioned above to be implemented later and (2) any interest assessed on underpayments and delinquent payments of principal amounts and interest thereon under § 24.3a. However, no reference to "interest" has been added in paragraph (a)(7) of § 24.1 because this paragraph concerns initial credit or charge card payments on non-commercial transactions, which would never involve an interest payment.

Section 24.3

The first sentence of § 24.3(b) is amended by adding references to the payment of estimated "fees" and "interest" in order to align the text on the terminology used in amended section 505. The words "if applicable" have been included after the added "interest" reference in recognition of the fact that interest would be required in an estimated payment circumstance only in some cases. A reference to the payment of estimated "taxes" has also been added to this regulatory text in order to reflect the fact that Customs collects taxes (*e.g.* harbor maintenance taxes) at the time of entry as part of the entry/liquidation process. Prior to the United States Supreme Court decision in *United States Shoe Corp. v. United States*, 118 S. Ct. 1290 (1998), Customs considered such harbor maintenance assessments to be "fees." However, the Supreme Court

held that such assessments are "taxes." Since Customs continues to be required by law to collect such assessments and other taxes, the regulations are being amended to reflect accurately the fact that Customs collects taxes at entry.

In addition, the text of § 24.3(e) has been revised. The text revision involves the following changes: (1) in the first sentence, the addition of references to bills for "fees" and "interest" and the inclusion of a statement that bills are due and payable "within 30 days of the date of issuance of the bill"; (2) the elimination of the outdated second sentence (which provided that a bill for increased or additional duties is due 15 days from the date of liquidation or reliquidation); and (3) the inclusion of an exception for bills resulting from dishonored checks or from dishonored Automated Clearinghouse (ACH) transactions, for which the revised text prescribes a 15-day bill payment period (see also the changes to § 24.3a regarding debit vouchers as discussed and set forth below). The last change reflects Customs' practice of requiring that bills for dishonored checks or dishonored ACH transactions be paid within 15 days of issuance of the bill. Interest assessments on such dishonored payments are provided for in the amendments to § 24.3a and are authorized because there is no statutory provision to the contrary. See *Billings v. United States*, 232 U.S. 261 (1914) and *United States v. Goodman*, 572 F. Supp. 1284 (CIT 1983).

Section 24.3a

In § 24.3a, the paragraph (a) discussion of supplemental duties has been modified to align on the terminology used in subsection (b) of amended section 505 and to reflect the considerations regarding taxes set forth above. Specifically, the words "taxes and fees" have been included after "duties" in two places, the words "increased or" have been included before "additional duties" within the parentheses, and the words "together with interest thereon," have been included after the parenthetical reference.

In addition, paragraph (b)(2) of § 24.3a has been revised to conform to the terms of amended section 505 regarding the accrual of interest on underpayments of duties, fees, and interest. In the revised text, paragraph (b)(2)(i), which concerns interest on initial underpayments and relates to subsection (c) of section 505, incorporates a number of illustrative examples and is further subdivided into subparagraphs (A), (B) and (C) in order to cover factual situations that arise under current Customs transaction practices and that of necessity will result in variations in the interest computation period under the basic statutory rule: subparagraph (A) concerns pre-liquidation excessive refunds; subparagraph (B) describes three scenarios involving pre-liquidation additional deposits; and subparagraph (C) concerns cases in which Customs receives a debit voucher indicating that a payment to Customs was not made because of a dishonored check or ACH transaction. Paragraph (b)(2)(ii) concerns interest on overdue bills and is based on subsection (d) of section 505.

Section 24.11

Section 24.11 has been modified by removing former paragraph (b) which affected only internal Customs procedures that are not appropriate for regulatory treatment. In addition, the remaining text (former paragraph (a)) has been simplified and references to increased or additional "fees" and "interest" have been inserted in the text and in the section heading.

Section 24.25

In § 24.25, the second sentence of paragraph (a) has been amended to reflect that interest may be due on a statement processing transaction.

Section 24.36

Section 24.36 is amended by revising the first sentence of paragraph (a), by adding a new sentence at the end of paragraph (a) followed by new paragraphs (a)(1)–(a)(3), by making wording changes in the first sentence of paragraph (b), and by making similar wording changes in paragraph (c). These changes reflect the amended section 505 provisions regarding the refund of excess moneys deposited and thus include the addition of references to the refund of excessive "fees" and "interest" and to the 30-day deadline for timely refunds, as provided for in section 505(b). Similar to the approach taken in § 24.3a(b)(2)(i) as discussed above, the modified § 24.36 text incorporates a number of illustrative examples and sets forth several scenarios, involving pre-liquidation additional excess deposits and pre-liquidation refunds, that arise in practice and require variations to the interest computation period under the basic statutory rule. The modified § 24.36 text also includes a specific reference to interest accrual in the case of a claim for a refund filed under 19 U.S.C. 1520(d) and Subpart D of Part 181 of the Customs Regulations; this change reflects the amendment to section 505(c) effected by section 2(a) of the Miscellaneous Act as discussed above. Finally, the changes incorporate the 30-day interest period provisions for delinquent refunds as provided for in section 505(d).

Section 159.6

A reference to "interest" has been added in each place where reference is made to duties, fees, and taxes assessed or found due in a liquidation or reliquidation context, to reflect the change to section 321(a) effected by section 3(a)(12) of the Miscellaneous Act as discussed above.

Sections 174.11 and 174.12

In § 174.11, a specific reference to the accrual of interest has been added in paragraph (c) to reflect that interest is a charge or exaction subject to protest within 90 days of the decision concerning such accrual. See *New Zealand Lamb Co. Inc. v. United States*, 40 F.3d 377 (Fed. Cir. 1994); *Syva Co. v. United States*, 681 F. Supp. 885 (CIT 1988); and *Travenol Laboratories Inc. v. United States*, 118 F. 3d 749 (Fed. Cir. 1997). In addition, a reference to receiving a refund has been added in paragraph (a)(2) of § 174.12. These two changes clarify that both the assessment and the refund (or non-refund) of interest are protestable decisions.

COMMENTS

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

INAPPLICABILITY OF PRIOR PUBLIC NOTICE AND COMMENT PROCEDURES AND DELAYED EFFECTIVE DATE REQUIREMENTS

Pursuant to the provisions of 5 U.S.C. 553(b)(B), Customs has determined that prior public notice and comment procedures on these regulations are unnecessary and contrary to the public interest. The regulatory changes correct the Customs Regulations by conforming them to the terms of statutory provisions, and to the principles reflected in judicial decisions, that are currently in effect. In addition, in some cases, the changes conform the regulatory provisions to longstanding Customs administrative procedures and practices that confer benefits on, or otherwise militate in favor of, the general public. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), Customs finds that there is good cause for dispensing with a delayed effective date.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Interest, Taxes, User fees, Wages.

19 CFR Part 159

Computer technology, Customs duties and inspection, Entry, Imports, Liquidation.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Protests.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, Parts 24, 159 and 174 of the Customs Regulations (19 CFR Parts 24, 159 and 174) are amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1–2. The general authority citation for Part 24 is revised, the specific authority citation for § 24.24 is removed, and the specific authority citations for §§ 24.1, 24.11 and 24.36 continue, to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.

Section 24.1 also issued under 19 U.S.C. 197, 198, 1648;

* * * * * * *

Section 24.11 also issued under 19 U.S.C. 1485(d);

* * * * * * *

Section 24.36 also issued under 26 U.S.C. 6423.

3. In §24.1:

a. The section heading is amended by adding "fees, interest," after "taxes,";

b. The introductory text of paragraph (a) is amended by adding "fees, interest," after "taxes,";

c. The first sentence of paragraph (a)(3)(i) is amended by adding "fees, interest," after "taxes,";

d. The first sentence of paragraph (a)(7) is amended by adding ", fees," after "taxes";

e. The first sentence of the introductory text of paragraph (b) is amended by adding "fees, interest," after "taxes,";

f. Paragraph (b)(3) is amended by adding "fees," after "taxes,";

g. Paragraph (d) is amended by adding "fees, interest," after "taxes,"; and

h. In paragraph (e), the first sentence is amended by adding ", interest," after "fees" and the second sentence is amended by adding ", fees, interest," after "taxes".

4. In § 24.3, the first sentence of paragraph (b) is amended by adding ", taxes, fees, and interest, if applicable," after "duties" and paragraph (e) is revised to read as follows:

§ 24.3 Bills and accounts; receipts.

* * * * * * *

(e) Except for bills resulting from dishonored checks or dishonored Automated Clearinghouse (ACH) transactions, all other bills for duties, taxes, fees, interest, or other charges are due and payable within 30 days of the date of issuance of the bill. Bills resulting from dishonored checks or dishonored ACH transactions are due within 15 days of the date of issuance of the bill.

5. In § 24.3a:

a. The section heading is revised;

b. Paragraph (a) is amended by removing the words "Supplemental duties (additional duties assessed upon liquidation or reliquidation)," and adding, in their place, the words "supplemental duties, taxes and fees (increased or additional duties, taxes and fees assessed upon liquidation or reliquidation) together with interest thereon,"; and

c. Paragraph (b)(2) is revised.

The revisions read as follows:

§ 24.3a Customs bills; interest assessment; delinquency; notice to principal and surety.

* * * * * * *

(b) * * *

(2) *Interest on supplemental duties, taxes, fees, and interest*—(i) *Initial interest accrual.* Except as otherwise provided in paragraphs (b)(2)(i)(A) through (b)(2)(i)(C) of this section, interest assessed due to an underpayment of duties, taxes, fees, or interest shall accrue from the date the importer of record is required to deposit estimated duties, taxes, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. An example follows:

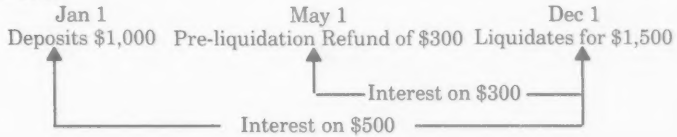
Example: Entry underpaid as determined upon liquidation

Importer owes $500 plus interest as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and the entry liquidates for $1,500 (December 1). Upon liquidation, the importer will be billed for $500 plus interest. The interest will accrue from the date payment was due (January 1) to date of liquidation (December 1).

(A) If a refund of duties, taxes, fees, or interest was made prior to liquidation or reliquidation and is determined upon liquidation or reliquidation to be excessive, in addition to any other interest accrued under this paragraph (b)(2)(i), interest also shall accrue on the excess amount refunded from the date of the refund to the date of liquidation or reliquidation of the applicable entry or reconciliation. An example follows:

Example: Pre-liquidation refund but entry liquidates for an increase



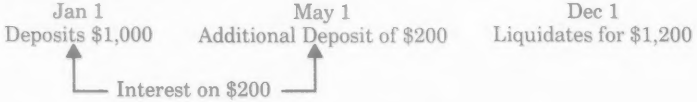
Importer owes $800 plus interest as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and receives a pre-liquidation refund of $300 (May 1) and the entry liquidates for $1,500 (December 1). Upon liquidation, the importer will be billed for $800 plus interest. The interest accrues in two segments: (1) on the original underpayment ($500) from the date of deposit (January 1) to the date of liquidation (December 1); and (2) on the pre-liquidation refund ($300) from the date of the refund (May 1) to the date of liquidation (December 1).

(B) The following rules shall apply in the case of an additional deposit of duties, taxes, fees, or interest made prior to liquidation or reliquidation:

(*1*) If the additional deposit is determined upon liquidation or reliquidation of the applicable entry or reconciliation to constitute the correct remaining balance that was required to be deposited on the date the deposit was due, interest shall accrue on the amount of the additional deposit only from the date of the initial deposit until the date the additional deposit was made. An example follows:

Example: Additional deposit made and entry liquidates for total amount deposited

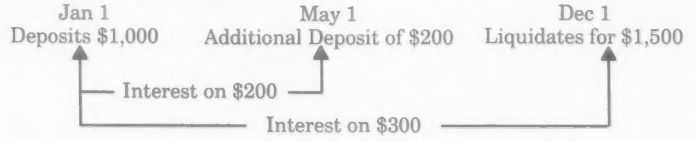


Importer owes interest on $200 as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and an additional pre-liquidation deposit of $200 (May 1) and the entry liquidates for $1,200 (December 1). Upon liquidation, the importer will be billed for interest on the original $200 underpayment from the date of the initial deposit (January 1) to the date of the additional deposit (May 1).

(2) If the additional deposit is determined upon liquidation or reliquidation of the applicable entry or reconciliation to be less than the full balance owed on the amount initially required to be deposited, in addition to any other interest accrued under this paragraph (b)(2)(i), interest also shall accrue on the remaining unpaid balance from the date deposit was initially required to the date of liquidation or reliquidation. An example follows:

Example: Additional deposit made and entry underpaid as determined upon liquidation

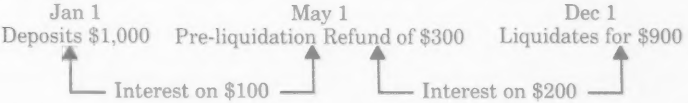


Importer owes $300 plus interest as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and an additional pre-liquidation deposit of $200 (May 1) and the entry liquidates for $1,500 (December 1). Upon liquidation, the importer will be billed for $300 plus interest. The interest accrues in two segments: (1) on the additional deposit ($200), from the date deposit was required (January 1) to the date of the additional deposit (May 1); and (2) on the remaining underpayment ($300), from the date deposit was required (January 1), to the date of liquidation (December 1).

(*3*) If an entry or reconciliation is determined upon liquidation or reliquidation to involve both an excess deposit and an excess refund made prior to liquidation or reliquidation, interest in each case shall be computed separately and the resulting amounts shall be netted for purposes of determining the final amount of interest to be reflected in the underpaid amount. An example follows:

Example: Excess pre-liquidation deposit and excess pre-liquidation refund



Importer owes $200 plus or minus net interest as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and receives a pre-liquidation refund of $300 (May 1) and the entry liquidates for $900 (December 1). Upon liquidation, the importer will be billied for $200 plus or minus net interest. The interest accrues in two segments: (1) interest accrues in favor of the importer on the initial overpayment ($100) from the date of deposit (January 1) to the date of the refund (May 1); and (2) interest accrues in favor of the Government on the refund overpayment ($200) from the date of the refund (May 1) to the date of liquidation (December 1).

(*4*) If the additional deposit or any portion thereof is determined upon liquidation or reliquidation of the applicable entry or reconciliation to constitute a payment in excess of the amount initially required to be deposited, the excess deposit shall be treated as a refundable amount on which interest also may be payable (see § 24.36).

(C) If a depository bank notifies Customs by a debit voucher that a Customs account is being debited due to a dishonored check or dishonored Automated Clearinghouse (ACH) transaction, interest shall accrue on the debited amount from the date of the debit voucher to either the date of payment of the debt represented by the debit voucher or the date of issuance of a bill for payment, whichever date is earlier.

(ii) *Interest on overdue bills.* If duties, taxes, fees, and interest are not paid in full within the applicable period specified in § 24.3(e), any un-

paid balance shall be considered delinquent and shall bear interest until the full balance is paid.

6. Section 24.11 is revised to read as follows:

§ 24.11 Notice to importer or owner of increased or additional duties, taxes, fees and interest.

Any increased or additional duties, taxes, fees or interest found due upon liquidation or reliquidation shall be billed to the importer of record, or to the actual owner if the following have been filed with Customs:

(a) A declaration of the actual owner in accordance with section 485(d), Tariff Act of 1930, as amended (19 U.S.C. 1485(d)), and § 141.20 of this chapter; and

(b) A bond on Customs Form 301 in accordance with § 141.20 of this chapter.

7. In § 24.25, the second sentence of paragraph (a) is amended by removing the words "and fees" and adding, in their place, the words ", fees, and interest".

8. In § 24.36:

a. Paragraph (a) is amended by revising the first sentence, adding a new sentence at the end and adding new paragraphs (a)(1) through (a)(3);

b. The first sentence of paragraph (b) is amended by removing the words "duties or taxes" and adding, in their place, the words "duties, taxes, fees or interest"; and

c. Paragraph (c) is amended by removing the words "duties or internal revenue taxes" and adding, in their place, the words "duties, taxes, fees or interest".

The revisions and additions read as follows:

§ 24.36 Refunds of excessive duties, taxes, etc.

(a) When it is found upon, or prior to, liquidation or reliquidation of an entry or reconciliation that a refund of excessive duties, taxes, fees or interest (at the rate determined in accordance with § 24.3a(c)(1)) is due, a refund shall be prepared in the name of the person to whom the refund is due, as determined under paragraphs (b) and (c) of this section. * * * For purposes of this section:

(1) Except as otherwise provided in paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the refund shall include interest on the excess moneys deposited with Customs, and such interest shall accrue from the date the duties, taxes, fees or interest were deposited or, in a case in which a proper claim is filed under 19 U.S.C. 1520(d) and subpart D of Part 181 of this chapter, from the date such claim is filed, to the date of liquidation or reliquidation of the applicable entry or reconciliation. An example follows:

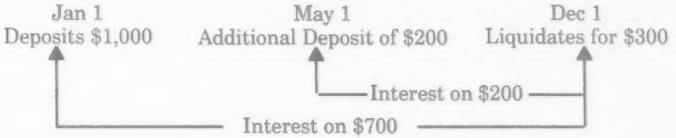
Example: Entry liquidates for a refund

Importer is owed a refund of $600 plus interest as follows:

The importer makes a $1,000 initial deposit (January 1) and the entry liquidates for $400 (December 1). Upon liquidation, the importer will be owed a refund of $600 plus interest. The interest will accrue from the date of deposit (January 1) to the date of liquidation (December 1).

(i) If an additional deposit of duties, taxes, fees or interest was made prior to liquidation or reliquidation and if any portion of that additional deposit was in excess of the amount required to be deposited, in addition to any other interest accrued under this paragraph (a)(1), the refund also shall include interest accrued on the excess additional deposit from the date of the additional deposit to the date of liquidation or reliquidation of the applicable entry or reconciliation. An example follows:

Example: Additional deposit made and entry liquidates for a refund



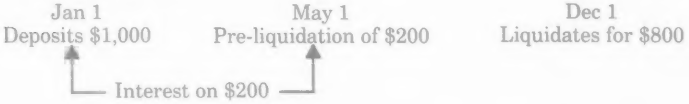
Importer is owed a refund of $900 plus interest as follows:

The importer makes a $1,000 initial deposit (January 1) and an additional pre-liquidation deposit of $200 (May 1) and the entry liquidates for $300 (December 1). Upon liquidation, the importer will be refunded $900 plus interest. The interest accrues in two segments: (1) on the additional deposit overpayment ($200), from the date of the additional deposit (May 1) to the date of liquidation (December 1); and (2) on the initial deposit overpayment ($700), from the date of deposit (January 1) to the date of liquidation (December 1).

(ii) In the case of a refund of duties, taxes, fees or interest made prior to liquidation, such a refund will include only principal amounts and not any interest thereon. Interest on such principal amounts will be computed at the time of liquidation or reliquidation and shall accrue as follows:

(A) Interest shall only accrue on the amount refunded from the date the duties, taxes, fees or interest were deposited to the date of the refund if the amount refunded is determined upon liquidation or reliquidation of the applicable entry or reconciliation to constitute the true excess amount deposited with Customs. An example follows:

Example: Pre-liquidation refund and entry liquidates for net amount collected



Importer is owed a refund of interest on $200 as follows:

The importer makes a $1,000 initial deposit (January 1) and receives a pre-liquidation refund of $200 (May 1) and the entry liquidates for $800 (December 1). Upon liquidation, the importer will be refunded interest on the $200 overpayment from the date of the initial deposit (January 1) to the date of the pre-liquidation refund (May 1).

(B) If the amount refunded is determined upon liquidation or reliquidation of the applicable entry or reconciliation to constitute less than the true excess amount deposited with Customs, in addition to any other interest accrued under this paragraph (a)(1), interest also shall accrue on the remaining excess deposit from the date the duties, taxes, fees or interest were deposited to the date of liquidation or reliquidation. An example follows:

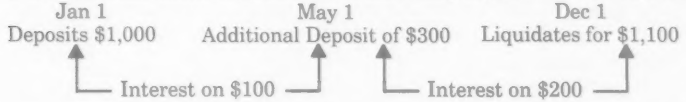
Example: Pre-liquidation refund and entry liquidates for an additional refund

Importer is owed a refund of $700 plus interest as follows:

The importer makes a $1,000 initial deposit (January 1) and receives a pre-liquidation refund of $200 (May 1) and the entry liquidates for $100 (December 1). Upon liquidation, the importer will be refunded $700 plus interest. The interest accrues in two segments: (1) on the pre-liquidation refund ($200), from the date of deposit (January 1) to the date of the pre-liquidation refund (May 1); and (2) on the remaining overpayment ($700), from the date of deposit (January 1) to the date of liquidation (December 1).

(C) If an entry or reconciliation is determined upon liquidation or reliquidation to involve both an initial underpayment and an additional excess deposit, interest in each case shall be computed separately and the resulting amounts shall be netted for purposes of determining the final amount of interest to be reflected in the refund. An example follows:

Example: Additional deposit made and entry liquidates for a refund



Importer is owed a refund of $200 plus or minus net interest as follows:

The importer makes a $1,000 initial deposit on the required date (January 1) and an additional pre-liquidation deposit of $300 (May 1) and the entry liquidates for $1,100 (December 1). Upon liquidation, the importer will be refunded $200 plus or minus net interest. The interest accrues in two segments: (1) interest accrues in favor of the Government on the initial underpayment ($100) from the date deposit was required (January 1) to the date of the additional deposit (May 1); and (2) interest accrues in favor of the importer on the overpayment ($200) from the date of the additional deposit (May 1) to the date of liquidation (December 1).

(D) If the amount refunded or any portion thereof exceeds the amount properly refundable as determined upon liquidation or reliquidation of the applicable entry or reliquidation, the excess amount refunded shall be treated as an underpayment of duties, taxes, fees or interest on which interest shall accrue as provided in § 24.3a.

(2) A refund determined to be due upon liquidation or reliquidation, including a refund consisting only of interest that has accrued in accordance with paragraph (a)(1)(ii) of this section, shall be paid within 30 days of the date of liquidation or reliquidation of the applicable entry or reconciliation.

(3) If a refund, including any interest thereon, is not paid in full within the applicable 30-day period specified in paragraph (a)(2) of this section, the refund shall be considered delinquent thereafter and interest shall accrue on the unpaid balance by 30-day periods until the full balance is paid. However, no interest will accrue during the 30-day period in which the refund is paid.

* * * * * * *

PART 159—LIQUIDATION OF DUTIES

1. The authority citation for Part 159 is revised to read as follows:

Authority: 19 U.S.C. 66, 1500, 1504, 1624. Subpart C also issued under 31 U.S.C. 5151.

Sections 159.4, 159.5, and 159.21 also issued under 19 U.S.C. 1315;
Section 159.6 also issued under 19 U.S.C. 1321, 1505;
Section 159.7 also issued under 19 U.S.C. 1557;
Section 159.22 also issued under 19 U.S.C. 1507;
Section 159.44 also issued under 15 U.S.C. 73, 74;
Section 159.46 also issued under 19 U.S.C. 1304;
Section 159.55 also issued under 19 U.S.C. 1558;
Section 159.57 also issued under 19 U.S.C. 1516;

2. The parenthetical authority citations at the end of §§ 159.4, 159.5, 159.6, 159.7, 159.21, 159.22, 159.44, 159.46, 159.55, and 159.57 are removed.

3. In § 159.6:

a. The first sentence of paragraph (a) is amended by removing the words "and taxes" the first time they appear and adding, in their place, the words "taxes, and interest";

b. The introductory text of paragraph (b) is amended by removing the words "and taxes" wherever they appear and adding, in their place, the words "taxes, and interest";

c. Paragraph (c) is amended by removing the words "and taxes assessed in the liquidation" and adding, in their place, the words "taxes, and interest assessed in the liquidation" and by removing the words "and taxes assessed in the reliquidation" and adding, in their place, the words "taxes, and interest assessed in the reliquidation"; and

d. In paragraph (d), the paragraph heading and the paragraph text are amended by adding "and interest" after "taxes".

PART 174—PROTESTS

1. The authority citation for Part 174 continues to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624.

2. In § 174.11, paragraph (c) is amended by adding ", including the accrual of interest," after "character".

3. In § 174.12, paragraph (a)(2) is amended by adding ", or receiving a refund of," after "paying".

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: July 28, 1999.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 20, 1999 (64 FR 56433)]

(T.D. 99–76)

GUIDELINES FOR THE ASSESSMENT AND MITIGATION OF CIVIL FINES UNDER 19 U.S.C. 1526(f)

AGENCY: Customs Service, Treasury.

ACTION: Final guidelines.

SUMMARY: This document sets forth the final guidelines for the assessment and mitigation of civil fines by Customs under 19 U.S.C. 1526(f) against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that has been seized because the merchandise bears a counterfeit mark.

EFFECTIVE DATE: October 27, 1999.

FOR FURTHER INFORMATION CONTACT: Matthew Riley, Penalties Branch (202–927–2329).

SUPPLEMENTARY INFORMATION:

BACKGROUND

After finding that counterfeit products cost American businesses an estimated $200 billion each year worldwide, Congress enacted, and the President signed into law on July 2, 1996, the Anticounterfeiting Consumer Protection Act of 1996 (the ACPA, Public Law 104–153, 110 Stat. 1386) to ensure that Federal law adequately addresses the scope and sophistication of modern counterfeiting.

Section 9 of the ACPA addressed the government's disposition of imported merchandise bearing a counterfeit trademark and specifically amended section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e)), to ensure that counterfeits of trademarked products are routinely destroyed after seizure and forfeiture under that section except where the product is not unsafe or a hazard to health and the trademark owner has consented to disposal of the product by one of several alternative methods specified in the statute.

Section 10 of the ACPA also amended section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), by adding a new subsection (f) that provides for the assessment of a civil fine against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under section 526(e). New subsection (f) further provides (1) for the first seizure, that the fine shall be not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP) of the genuine good, and for the second seizure (and thereafter), not more than twice that value, and (2) that the imposition of any such fine shall be within the discretion of Customs and shall be in addition to any other civil or criminal penalty or other remedy authorized by law.

On November 17, 1997, Customs published interim regulations in the Federal Register (62 FR 61231, T.D. 97–91) to implement sections 9 and 10 of the ACPA. The implementation of section 9 was effected by revising § 133.52(c) of the Customs Regulations (19 CFR 133.52(c)), and the implementation of section 10 was effected by the addition of a new § 133.25 to the Customs Regulations (19 CFR 133.25). Those interim regulations were adopted as a final rule in T.D. 98–75, which was published in the Federal Register (63 FR 51296) on September 25, 1998. (It should be noted that § 133.25 was renumbered as § 133.27 in a final rule document (T.D. 99–21) revising trademark enforcement provisions in part 133 of the Customs Regulations (19 CFR part 133), which was published in the Federal Register (64 FR 9058) on February 24, 1999.)

On March 10, 1999, Customs published a Notice of Proposed Guidelines in the Customs Bulletin and Decisions (Vol. 33, No. 10, page 42) that set forth proposed guidelines for the assessment of civil fines by Customs under 19 U.S.C. 1526(f) against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that has been seized because the merchandise bears a counterfeit mark. (It is noted that the term "mark" includes all trademarks, service marks, collective marks, and certification marks.) That document also set forth guidelines for the mitigation of civil fines assessed by Customs, and solicited comments from the public. The comment period closed May 10, 1999. Two commenters responded to the solicitation for comments. The comments and Customs responses are set forth below.

DISCUSSION OF COMMENTS

Comment:

The first commenter welcomed Customs efforts to promulgate guidelines that would provide for the assessment of these civil fines, insofar as such fines will have a substantial deterrent effect on the theft of intellectual property rights. This commenter recommended that increased criminal enforcement and prosecution would serve as a further deterrent.

Customs response:

Customs agrees that implementation of the guidelines promulgated pursuant to 19 U.S.C. 1526(f) will have a substantial deterrent effect on those who profit from intellectual property rights theft. However, as the commenter is aware, the guidelines pertain only to the civil fine provisions of this section, and are not intended to encompass criminal enforcement.

Comment:

The second commenter expressed concern as to the negative impact of assessed fines on violators and recommended that, for a first offense, where merchandise has been seized and forfeited under 1526(e), there should be no fine, or a *de minimis* fine, since even the mitigation

amount (10–30% of the assessed amount) would be beyond a violator's ability to pay.

Customs response:

The legislative history of the ACPA indicates that Congress intended to stem the flow of counterfeit merchandise into the U.S. through the use of the remedies set forth in the statute. Further, new section 1526(f)(2) specifically provides for fines for the first offense. Any arguments pertaining to a petitioner's ability to pay are considered on a case-by-case basis during the petitioning process (see "Mitigating Factors," section V, number 5), and are not appropriately considered in advance of any supporting evidence. Accordingly, no change will be made to the guidelines based on this comment.

Comment:

The second commenter also argued that the petitioner (violator) may have more expertise in determining the MSRP of the genuine good (as distinguished from their own counterfeit trademarked merchandise), and as such should be allowed to provide input to the pertinent Customs officers on this matter.

Customs Response:

Customs considers all information provided by petitioners, which includes any information that could directly impact the fine amount. Of course, such information is subject to verification. Therefore, since all information and arguments contained in petitions are considered by Customs as a matter of course, there is no reason to change the guidelines to specifically provide for this procedure.

Comment:

The second commenter additionally recommended that the guidelines incorporate the principle that if the seized merchandise is "unordered" merchandise, then no fine should be assessed.

Customs Response:

The commenter is suggesting that importers in the United States are receiving counterfeit trademarked merchandise that they did not order. Assuming the term "unordered" merchandise implies a circumstance where the importer did not direct, assist financially or otherwise, or aid and abet the importation of the "unordered" merchandise, then of course no liability would attach to the importer because the importer's actions are outside the scope of the prohibited conduct. In any event, Customs does not believe that the scenario suggested by the commenter is a prevalent occurrence that should be separately provided for in the guidelines. Accordingly, no change to the guidelines is made based on this comment.

Comment:

The second commenter further recommended that if title to the merchandise does not pass until the merchandise reaches the door of the U.S. buyer, there should be no liability.

Customs Response:

Title and ownership are not prerequisites for imposition of a fine under 1526(f). Section 1526(f) provides that any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection 1526(e) is subject to a civil fine. Therefore, all parties who exercise control over the import transaction are subject to the statute's provisions. (See, section III, "Parties Subject to Fines"). No change to the guidelines is made based on this comment.

Comment:

The second commenter further argued that if there is no comparable "genuine" merchandise that can be used to determine the MSRP of the genuine good, there should be no fine.

Customs Response:

Customs disagrees. Comparable merchandise is normally available and, if necessary, an appraising officer can assist with the determination of what constitutes an appropriate MSRP for a similar class or kind of genuine good.

CONCLUSION

While after careful consideration of the comments received, Customs believes no changes to the proposal are necessary in response to the comments, after further internal review of the matter, Customs has decided to make the following changes to the proposed text:

1) The title of the guidelines and the "Background" section are revised to clarify that, for the purposes of these guidelines, counterfeit "trademark" includes all counterfeit marks within the meaning of section 1127 of Title 15 (including service marks, collective marks, and certification marks);

2) Section II, "Jurisdiction and Processing," is deleted since it pertains exclusively to the internal policies and procedures of the Customs Service; and

3) Section VII (formerly section VIII), denominated "Sample Retention," is changed in order to place the requirement of sample retention on the officer(s) who would be best suited, *i.e.*, the seizing officer, and/or the import specialist (these are the parties that have the direct access to the merchandise, and the ability to acquire and store a sample).

Other minor changes are made for editorial purposes.

Below is set forth the text of the final guidelines as adopted:

GUIDELINES FOR THE IMPOSITION OF, AND MITIGATION OF, CIVIL FINES UNDER 19 U.S.C. 1526(f), REGARDING IMPORTATIONS BEARING COUNTERFEIT MARKS

(TRADEMARKS, SERVICE MARKS, COLLECTIVE MARKS, AND CERTIFICATION MARKS)

BACKGROUND

Through the amendment of 19 U.S.C. 1526(e) and the adoption of 19 U.S.C. 1526(f) in sections 9 and 10 of the Anticounterfeiting Consumer Protection Act (the ACPA, Public Law 104–153, 110 Stat. 1386), Congress indicated its intent to control and prevent commercial counterfeiting and to increase civil penalties for the importation of merchandise bearing counterfeit trademarks.

Therefore, imported goods bearing a *counterfeit* mark (within the meaning of section 1127 of Title 15, which includes trademark, service mark, collective mark, and certification mark) shall be seized and forfeited and (except where the goods are not unsafe or a hazard to health, and Customs has the written consent of the trademark owner for an authorized alternative disposition) destroyed pursuant to 19 U.S.C. 1526(e), *and* civil penalties should be routinely imposed under 19 U.S.C. 1526(f).

I. Application of 19 U.S.C. 1526(f) Generally

The Congressional intent behind the ACPA was to provide Customs with the authority to impose civil fines pursuant to 19 U.S.C. 1526(f) in addition to the seizure and forfeiture of imported merchandise bearing *counterfeit* trademarks. Therefore, once the merchandise is found to contain a counterfeit trademark and is seized and forfeited and destroyed or otherwise disposed of pursuant to 19 U.S.C. 1526(e), then a civil fine also may be imposed under 19 U.S.C. 1526(f). *See also* Section VII regarding sample retention.

The policies reflected in these Guidelines are designed to promote uniformity in the exercise of Customs discretion both with regard to determining which parties will be assessed civil fines and with regard to the amount of such fines.

II. Administrative Process

The administrative process for the imposition of civil fines under 19 U.S.C. 1526(f) is sequentially as follows:

1. Follow the procedures in 19 CFR 162.31.
2. Mitigate pursuant to 19 U.S.C. 1618 (see Section V of these guidelines), if appropriate.
3. If the assessed or mitigated fine is not paid, refer the case to the appropriate Associate or Assistant Chief Counsel's Office for referral to the Department of Justice for collection.

III. Parties Subject to Fines

As noted above, with the enactment of the ACPA, Congress intended to broaden the ability of the government to penalize those involved in

all aspects of the importation of merchandise bearing counterfeit trademarks. In this regard, 19 U.S.C. 1526(f)(1) specifically refers to "[a]ny person who directs, assists financially or otherwise, or aids and abets the importation of merchandise * * *." This statutory language subjects all parties who exercise control over the import transaction to its application. These individuals may be named individually or jointly and severally in penalty notices.

IV. Discretionary Amount of Fine

Under 19 U.S.C. 1526(f), the amount of the fine is discretionary with Customs and thus may be less than, but may not exceed, the applicable statutory maximum (that is, not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price (MSRP), for the first seizure, and not more than twice that value for the second seizure and each seizure thereafter). However, in consideration of the Congressional intent to increase the available civil penalties through the ACPA, it is the policy of Customs that:

1. For the first seizure under 19 U.S.C. 1526(e), the fine assessed should be the maximum allowable fine, that is, the domestic value of the merchandise (see 19 CFR 162.43(a)) as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure; and

2. For the second and each subsequent seizure (that is, where there has been a prior seizure under 19 U.S.C. 1526(e) and fine under 19 U.S.C. 1526(f)), the fine assessed shall be *twice* the domestic value of the merchandise as if it had been genuine, based on the MSRP of the genuine merchandise at the time of seizure.

V. Mitigation Phase

In the mitigation phase, Customs may consider aggravating and mitigating factors. It should be noted, however, that whereas a lack of intent or knowledge as to the counterfeit nature of the importation(s) in question may be considered a mitigating factor in determining the final amount of the fine, it does not shield the involved party from initial assessment of the fine. In T.D. 97–91 (Interim Regulations) we indicated our intention to apply the guidelines for remission contained in the appendix of Customs Directive 4400–07 (a.k.a. 1595a(c) Guidelines) as a framework for remission of these civil fines. While we have incorporated many of those precepts, we have also found it necessary to adopt new parameters for remission under 19 U.S.C. 1526(f).

Dispositions:

1. First offense (under 19 U.S.C. 1526(f)), with mitigating, and no aggravating factor(s):

   10–30% of the applicable MSRP of the genuine good (the assessed fine amount).

2. First offense (under 19 U.S.C. 1526(f)), with aggravating factor(s):

   30–50% of the MSRP of the genuine good.

3. First offense (under 19 U.S.C. 1526(f)), with evidence of knowledge as to the counterfeit nature of the goods, with no aggravating factors:

50–80% of the MSRP of the genuine good.

4. Second offense (under 19 U.S.C. 1526(f)), with mitigating, and no aggravating factor(s):

10–30% of twice the MSRP of the genuine good.

5. Second offense (under 19 U.S.C. 1526(f)), with aggravating factor(s), or third or subsequent offense (under 19 U.S.C. 1526(f)):

50–80% of twice the MSRP of the genuine good.

6. Second offense (under 19 U.S.C. 1526(f)), with evidence of knowledge as to the counterfeit nature of the goods:

no mitigation.

Mitigating Factors:

1. Lack of knowledge of the counterfeit nature of the trademark.
2. Prior good record of importations under 19 U.S.C. 1526.
3. Inexperience in importing.
4. Cooperation with Customs officers in ascertaining the facts establishing the violation.
5. Inability to pay the fine (demonstrated by documentary evidence including, but not limited to, income tax returns for the prior three years).

Aggravating Factors:

1. More than two prior importations of merchandise seized and forfeited under 19 U.S.C. 1526(e).
2. Criminal violation relating to the subject transaction.
3. Submission of falsified documentation (*i.e.*, false description, false country of origin, etc.), or other deceptive practices in connection with the subject importation.

Note that these fines are in addition to the seizure and forfeiture of merchandise under 19 U.S.C. 1526(e).

VI. Personal Use

The statute authorizes fines only against persons (including domestic and foreign corporations) involved with the importation of merchandise "for sale or public distribution" that has been seized under 19 U.S.C. 1526(e). Therefore, fines shall not be assessed under 19 U.S.C. 1526(f) in the case of personal use importations (*see also* 19 CFR 148.55). However, any separately imported merchandise bearing a counterfeit trademark will still be seized, forfeited, and destroyed or otherwise disposed of under 19 U.S.C. 1526(e).

VII. Sample Retention

A sample of the merchandise seized under 19 U.S.C. 1526(e) will be retained by the seizing Customs Officer, or Import Specialist, until the fine under 19 U.S.C. 1526(f) is finally resolved, insofar as the fine under

19 U.S.C. 1526(f) may become the subject of litigation after the seized merchandise has been forfeited and disposed of under 19 U.S.C. 1526(e). Any and all samples retained will be disposed of pursuant to 19 U.S.C. 1526(e) upon entry of final judgment and completion of any appeals regarding the assessed fine(s).

VIII. Responsibilities

Each Port Director will be responsible for ensuring that the provisions of these Guidelines are implemented uniformly within the geographical area under his jurisdiction.

Advice concerning the application of these Guidelines may be requested from the Chief, Penalties Branch, Headquarters (202–927–2344). Legal advice concerning this subject may be requested from the appropriate Associate or Assistant Chief Counsel's Office.

The statements made herein are not intended to create or confer any rights, privileges or benefits for any private person, but are intended merely for internal guidance.

Dated: October 13, 1999.

RAYMOND W. KELLY,
Commissioner of Customs.

U.S. Customs Service

General Notice

PERFORMANCE REVIEW BOARD— APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces the appointment of the members of the United States Customs Service Performance Review Board (PRB's) in accordance with 5 U.S.C. 4314(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and to make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Robert M. Smith, Personnel Director, Human Resources Management, United States Customs Service, 1300 Pennsylvania Avenue, NW, Room 2.4–A, Washington, D.C. 20229; Telephone (202) 927–2900.

BACKGROUND

There are two (2) PRB's in the U.S. Customs Service.

Performance Review Board 1

The purpose of this Board is to review the performance appraisals of senior executives rated by the Commissioner of Customs. The members are:

John C. Dooher, Senior Assistant Director, Washington Center, Federal Law Enforcement Training Center

David Medina, Deputy Assistant Secretary, Enforcement Policy, Department of the Treasury

Jane E. Vezeris, Assistant Director, Office of Administration, U.S. Secret Service

Anna Fay Dixon, Director, Office of Enforcement Budget Resources Policy, Office of the Under Secretary of the Treasury for Enforcement, Department of the Treasury

John P. Simpson, Deputy Assistant Secretary, Regulatory, Tariff and Trade Enforcement, Department of the Treasury.

Performance Review Board 2

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Commissioner of Customs. The members are:

William F. Riley, Director, Office of Planning, Office of the Commissioner

Assistant Commissioners:

Douglas M. Browning, International Affairs
Marjorie L. Budd, Training and Development
S.W. Hall, Information and Technology/CIO
Curtis W. Hamilton, Finance/CFO
William A. Keefer, Internal Affairs
Stuart P. Seidel, Regulations and Rulings
Lance S. Statler, Congressional Affairs
Deborah J. Spero, Human Resources Management
Bonni G. Tischler, Investigations
Robert S. Trotter, Strategic Trade
Charles W. Winwood, Field Operations.

Dated: October 12, 1999.

RAYMOND W. KELLY,
Commissioner of Customs.

[Published in the Federal Register, October 18, 1999 (64 FR 56245)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 10–1999)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of September 1999 follow. The last notice was published in the CUSTOMS BULLETIN on October 6, 1999.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Caridad Berdut, Acting Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: October 13, 1999.

CARIDAD BERDUT,
Acting Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

10/04/99 U.S. CUSTOMS SERVICE PAGE 1
13:12:18 IPR RECORDATIONS ADDED IN SEPTEMBER 1999 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
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COP9900226	19990915	20190915	TAE BO LIVE-ADVANCED	SHAPE THE FUTURE INTERNATIONAL	N
COP9900227	19990915	20190915	TAE BO LIVE-BASIC	SHAPE THE FUTURE INTERNATIONAL	N
COP9900228	19990915	20190915	TAE BO-ADVANCED	SHAPE THE FUTURE INTERNATIONAL	N
COP9900229	19990915	20190503	CIRCUS	SASAKI PRODUCTS COMPANY	N
COP9900230	19990915	20110603	CRYING BABY GIRL	FUNG SENG INDUSTRIAL CO., LTD.	N
COP9900231	19990915	20171006	MAGIC BABY (MODEL NO. 8211)	FUNG SENG INDUSTRIAL COMPANY LTD	N
COP9900232	19990917	20090917	CONSUL PACKAGING I	C.A. CIGARRERA BIGOTT SUCS. AV.	N
COP9900233	19990922	20180922	TY INC. ANTS #4195	TY INC.	N
COP9900234	19990922	20180922	TY INC. EARLY #4190	TY INC.	N
COP9900235	19990922	20180922	TY INC. FETCH #4189	TY INC.	N
COP9900236	19990922	20180922	TY INC. GLORY #4188	TY INC.	N
COP9900237	19990922	20180922	TY INC. FORTUNE #4196	TY INC.	N
COP9900238	19990922	20180922	TY INC. GIGI #4191	TY INC.	N
COP9900239	19990922	20180922	TY INC. JABBER #4197	TY INC.	N
COP9900240	19990922	20180922	TY INC. JAKE #4199	TY INC.	N
COP9900241	19990922	20180922	TY INC. KUKU #4192	TY INC.	N
COP9900242	19990922	20180922	TY INC. ROCKET #4202	TY INC.	N
COP9900243	19990922	20180922	TY INC. STINGER #4193	TY INC.	N
COP9900244	19990922	20180922	TY INC. TRACKER #4198	TY INC.	N
COP9900245	19990922	20180922	TY INC. WISE #4187	TY INC.	N
COP9900246	19990922	20180922	TY INC. WHISPER #4194	TY INC.	N
COP9900247	19990924	20080924	REAL PIGGY	IWAYA CORPORATION	N
COP9900248	19990924	20190924	THE NEW ADAMS FAMILY SERIES-STYLE GUIDE (DOMESTIC)	FOXFAMILY PROPERTIES INC.	N
COP9900249	19990928	20190928	POKEMON-GOTTA CATCH'EM ALL (SCORPIO)	NINTENDO OF AMERICA INC.	N
COP9900250	19990929	20190929	TY INC. WISER POSEABLE OWL #4238	TY INC.	N
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TMK9900205	19990915	20040903	DESIGN OF GUITAR PARTS	KAMAN MUSIC CORPORATION	N
TMK9900214	19990914	20080310	COLORADO RAPIDS	MAJOR LEAGUE SOCCER L.L.C.	N
TMK9900215	19990914	20080106	DALLAS BURN (STYLIZED LETTERS)	MAJOR LEAGUE SOCCER L.L.C.	N
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TMK9900415	19990901	20010609	ALKA-SELTZER	BAYER CORPORATION	N
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TMK9900418	19990908	20080929	NEVER COMPROMISE	NEVER COMPROMISE INC.	N
TMK9900419	19990908	20090330	THREE DIMENSIONAL DEVICE	WINNER INTERNATIONAL ROYALTY	Y
TMK9900420	19990909	20051114	DISTALOY	HOEGANAES CORPORATION	N
TMK9900421	19990909	20051114	HOGANAS WITH DESIGN	HOEGANAS CORPORATION	N
TMK9900422	19990909	20061029	DILBERT	UNITED FEATURE SYNDICATE INC.	N
TMK9900423	19990909	20081215	DILBERT	UNITED FEATURE SYNDICATE INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
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TMK9900433	19990910	20081124	STIMUSOIL	STIMUSOIL, INC.	N
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TMK9900438	19990914	20080714	DAFFI	MAG CORPORATION	Y
TMK9900439	19990915	20000310	DECORATIVE INLAY AROUND THE SOUNDHOLE OF THE GUITAR	KAMAN MUSIC CORPORATION	N
TMK9900440	19990915	20030416	BAILEY AND DESIGN	BAILEY SALES CORPORATION	N
TMK9900441	19990915	20061203	CHIEF	BAILEY SALES CORPORATION	N
TMK9900442	19990915	20090213	MCDONALD'S	MCDONALD'S CORPORATION	N
TMK9900443	19990915	20090220	MCDONALDLAND	MCDONALD'S CORPORATION	N
TMK9900444	19990915	20090313	MCDONALD'S IN ARCH DESIGN	MCDONALD'S CORPORATION	N
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TMK9900448	19990916	20081020	TRIBESTAN	SOPHARMA EAD	N
TMK9900449	19990917	20090417	PRESCRIPTIVES	ESTEE LAUDER INC.	N
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TMK9900457	19990921	20080414	BUNGEE BAG	FORTE SPORTS, INC./MARK MANNISO	N
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TMK9900459	19990922	20031109	ROBO PLAY	GEMINI SOUND PRODUCTS CORP.	N
TMK9900460	19990922	20030525	PDM	GEMINI SOUND PRODUCTS CORP.	N
TMK9900461	19990922	20030406	PMX	GEMINI SOUND PRODUCTS CORP.	N
TMK9900462	19990922	20030406	SCRATCHMASTER	GEMINI SOUND PRODUCTS CORP.	N
TMK9900463	19990924	20061008	OLD NAVY	OLD NAVY (APPAREL) INC.	N
TMK9900464	19990924	20090314	ARTMATIC U.S.A.	AM COSMETICS, INC.	N
TMK9900465	19990924	20010630	WET'N WILD	PAVION LTD.	N
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TMK9900468	19990927	20090309	CLEARLUNGS	RIDGECREST HERBALS, INC.	N
TMK9900469	19990927	20090323	RIDGECREST HERBALS	RIDGECREST HERBALS, INC.	N
TMK9900470	19990927	20090302	BLUE'S CLUES	VIACOM INTERNATIONAL INC.	N
TMK9900471	19990928	20010728	KASPER	KASPER A.S.L.	Y
TMK9900472	19990929	20070922	HARVEYS BRISTOL CREAM LABEL	ALLIED DOMECQ SPIRITS & WINE LTD	N

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13:12:18 IPR RECORDATIONS ADDED IN SEPTEMBER 1999 DETAIL

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TMK9900475	19990929	20030207	BRISTOL CREAM	ALLIED DOMECQ SPIRITS & WINE LTD	N
TMK9900476	19990929	20050713	HARVEYS OF BRISTOL	ALLIED DOMECQ SPIRITS & WINE LTD	N
TMK9900477	19990929	20050713	HARVEYS OF BRISTOL LOGO	ALLIED DOMECQ SPIRITS & WINE LTD	N
TMK9900478	19990929	20080702	HARVEYS	ALLIED DOMECQ SPIRITS & WINE LTD	N
TMK9900479	19990929	20090518	FULLMARK IN OVAL	FULLMARK PTE. LTD.	N
TMK9900480	19990929	20090119	MISCELLANEOUS DESIGN	WING LE IMPORT & EXPORT, INC.	N
TMK9900481	19990929	20031109	CHARLIE CHAPLIN	BUBBLES INCORPORATED S.A.	N
TMK9900482	19990929	20090209	ATV (DESIGN)	ADVANCED TECHNOLOGY VIDEO, INC.	N
TMK9900483	19990929	20020630	B.U.M EQUIPMENT	B.U.M. INTERNATIONAL, INC.	N
TMK9900484	19990930	20010812	B.U.M. EQUIPMENT	B.U.M. INTERNATIONAL, INC.	N
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TMK9900486	19990930	20030921	B.U.M. SPORT	B.U.M. INTERNATIONAL, INC.	N
TMK9900487	19990930	20031106	LI'L B.U.M.	B.U.M. INTERNATIONAL, INC.	N
TMK9900488	19990930	20031207	B.U.M. KIDS	B.U.M. INTERNATIONAL, INC.	N
TMK9900489	19990930	20040222	LITTLE B.U.M.	B.U.M. INTERNATIONAL, INC.	N
TMK9900490	19990930	20070225	B.U.M.	B.U.M. INTERNATIONAL, INC.	N
TMK9900491	19990930	20070225	B U M	B.U.M. INTERNATIONAL, INC.	N
TMK9900492	19990930	20070225	B.U.M. SPORT	B.U.M. INTERNATIONAL, INC.	N
TMK9900493	19990930	20060705	SAFETY HOOK COLORED GOLD	THE CROSBY GROUP INC.	N
TMK9900494	19990930	20031207	COLOR BLUE AND ORANGE ON BLOCKS	THE CROSBY GROUP INC.	N
TMK9900495	19990930	20080303	SOON CHANG HOT BEAN PASTE	RHEE BROS. INC.	N
TMK9900496	19990930	20090223	AMERICASE	AMERICASE INC.	N
TMK9900497	19990930	20090223	AMERI-FLITE	AMERICASE INC.	N
TMK9900498	19990930	20090216	AMERI-FLITE	AMERICASE INC.	N
TMK9900499	19990930	20051212	SKYVISION AND DESIGN	SKYVISION INC.	Y
TMK9900500	19990930	20081208	PERFECT ORDER	LACERTA ENTERPRISES INC.	N
TMK9900501	19990930	20050117	F LOGO	FRANKLIN SPORTS INC.	Y
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TMK9900503	19990930	20041207	FRANKLIN	FRANKLIN SPORTS INC.	Y
TMK9900504	19990930	20051107	FRANKLIN	FRANKLIN SPORTS INC.	N
TMK9900505	19990930	20050124	FRANKLIN	FRANKLIN SPORTS INC.	Y
TMK9900506	19990930	20051031	F LOGO	FRANKLIN SPORTS INC.	Y

SUBTOTAL RECORDATION TYPE 102

TOTAL RECORDATIONS ADDED THIS MONTH 129

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Decisions of the United States Court of International Trade

(Slip Op. 99–94)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ELETROSILEX BELO HORIZONTE, DEFENDANT-INTERVENOR

Court No. 94–09–00555

(Dated September 9, 1999)

ORDER

MUSGRAVE, *Judge:* Upon review of the United States Department of Commerce's *Silicon Metal From Brazil, Final Results of Redetermination Pursuant to Court Remand Court No. 94–09–00555*, filed on November 14, 1997, and *Silicon Metal From Brazil, Final Results of Redetermination Pursuant to Court Remand, American Silicon Technologies v. United States, Court No. 94–09–00555, Slip Op. 98–22 (March 5, 1998)* filed on January 29, 1999, (collectively "remand results"), and the submissions of the parties in proceedings to date, it is hereby

ORDERED that both sets of the remand results are sustained as to the determination of the eight issues remanded to Commerce in *American Silicon Technologies v. United States*, ____ CIT ____, Slip Op. 97–58 (May 15, 1997); and it is further

ORDERED that the stay of the three issues remaining in this action is lifted; and it is further

ORDERED that, in view of the complexity of what has transpired in this case and other related cases before this Court, the parties shall, submit briefs addressing the three remaining issues, which are (1) calculation of dumping margins based upon sales during the review period in absence of shipment into the U.S., (2) treatment of ICMS and IPI taxes for Companhia Brasilaira Carbureto de Calcio ("CBCC") and Minasligas, and (3) use of information from Solvay do Brasil's consolidated financial statements in calculating CBCC's monthly interest expenses. In partic-

ular, the parties' briefs shall discuss this Court's holdings in *American Silicon Technologies*, Court No. 97-02-00267, ____ CIT ____, Slip Op. 99-34 (April 9, 1999), as they relate to the final determination of the these three issues. Plaintiff's brief shall be filed within 60 days of the date of this order. Defendant and defendant-intervenors shall have 60 days from the date of service of plaintiff's brief to file response briefs, and plaintiff shall have 25 days from the date of service of the response briefs to file a reply brief.

(Slip Op. 99-95)

BMW MANUFACTURING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97-03-00396

[Partial summary judgment for defendant.]

(Dated September 14, 1999)

Lamb & Lerch (Sidney H. Kuflik and *David R. Ostheimer)* for plaintiff.
David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes* and *Lara Levinson), Richard McManus*, Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on cross-motions for summary judgment. Plaintiff seeks recovery of Harbor Maintenance Tax ("HMT")[1] payments collected by the United States Customs Service on merchandise admitted into a foreign trade zone ("FTZ") within the geographical territory of the United States.

I. JURISDICTION

In *United States v. U.S. Shoe Corp.*, 118 S.Ct. 1290 (1998), the Supreme Court held that imposition of the HMT on exports violated the Export Clause of the Constitution. It also upheld jurisdiction over such challenges in this court, pursuant to 28 U.S.C. § 1581(i). *Id.* at 1293-94. The HMT on admissions into foreign trade zones is paid on a quarterly basis, as was the HMT on exports. Again, Customs' role as HMT collector is passive; it merely receives payments. There is no decision-making by Customs under 19 U.S.C. § 1514 which would give rise to protest-denial jurisdiction under 28 U.S.C. § 1581(a). As no other subsection of § 1581 specifically covers these claims, the court's residual jurisdiction, 28 U.S.C. § 1581(i), applies. *See Miller v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (§ 1581(i) jurisdiction proper only when jurisdiction not otherwise available under another subsection of § 1581).

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[1] The HMT is established by 26 U.S.C. §§ 4461, 4462 (1994).

II. BACKGROUND[2]

Plaintiff, BMW Manufacturing Corporation ("BMW"), is a United States company incorporated in the State of Delaware. BMW is a wholly-owned subsidiary of Bayerische Motoren Werke Aktiengesellschaft of Munich, Germany. BMW has a facility in Spartanburg, South Carolina, at which it both manufactures motor vehicles and receives foreign manufactured motor vehicles. BMW utilizes U.S. components and foreign components in the vehicles it manufactures at Spartanburg. The Spartanburg-manufactured motor vehicles are sold in the United States, as well as shipped abroad for sale in other countries. The foreign-produced motor vehicles received at the Spartanburg facility are intended for sale in the U.S. BMW's Spartanburg facility is a foreign trade subzone.[3] Foreign goods admitted to the Spartanburg FTZ, including complete motor vehicles and automotive components, are entitled to receive beneficial FTZ treatment. *See generally* 19 U.S.C. Chapter 1 and 19 C.F.R. Part 146 (1999).

Customs regulations mandate the imposition and collection of the Harbor Maintenance Tax upon the admission of foreign merchandise into a FTZ. *See* 19 C.F.R. § 24.24(e)(2)(iii) (1999). The HMT is to be paid on a quarterly basis by the party responsible for admitting the foreign goods into the FTZ by way of a completed Customs Form 349 ("CF 349"). *See id.*

Four types of shipments are listed on the CF 349 for which HMT payments must be made on a quarterly basis: exports, domestic movements, passengers, and FTZ admissions. As the party admitting foreign goods into a FTZ, BMW has been filing CF 349s with its HMT payments for its FTZ admissions of foreign merchandise in the manner prescribed by Customs Regulation § 24.24(e)(2)(iii).

BMW commenced this civil action challenging the imposition and collection of the HMT on the foreign goods it has admitted into its Spartanburg FTZ. BMW's amended complaint raised four causes of action. Three of the causes of action—the severability claim, the Port Preference constitutional claim and the Uniformity constitutional claim—have not been briefed, and plaintiff does not desire to brief them in this action. Rather, plaintiff relies on the presentations in other test cases and raises the claims protectively. The court has recently found these three legal theories wanting and has dismissed a test case based upon them for failure to state a claim. *See Amoco Oil Co. v. United States*, No. 95-07-00971 (Ct. Int'l Trade Sept. 1, 1999). The court adopts that opinion for purposes of this case.

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[2] The statement of facts is derived from plaintiff's opening brief. Defendant does not dispute the material facts contained therein.

[3] The difference between a general purpose foreign-trade zone and a foreign trade subzone is that the former must be made available for use to multiple entities which desire to operate within a foreign-trade zone. If a company is unable to operate within a general purpose foreign-trade zone, a foreign-trade subzone can be established for the use of a single specific company. *See Citgo Petroleum Corp. v. United States Foreign Trade-Zones Board*, 83 F.3d 397, 399 (Fed. Cir. 1996); *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 884 F.2d 1375, 1375–76 (Fed. Cir. 1989) (quoting *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 12 CIT 737, 738, 693 F.Supp. 1183, 1185 (1988)); *Armco Steel Corp. v. Stans*, 431 F.2d 779, 788–89 (2d Cir. 1970).

III. DISCUSSION

Plaintiff's argument relies on two premises, the first of which is not disputed. First, Customs duties on imports are not paid upon admission to a FTZ. Rather, they are paid if the goods exit the FTZ for entry into the Customs Territory of the United States. *See* 19 U.S.C. § 81c(a). Second, section 4662(f)(1) of Title 26 requires the HMT to be treated as a customs duty for administrative and enforcement purposes, and 19 U.S.C. § 1528 requires that a tax is to be construed as a customs duty if it is to be treated as a customs duty. Ergo, plaintiff argues that Customs regulations requiring collection of the HMT on admission into a FTZ violates statutory law. *See* 19 C.F.R. § 24.24(e)(2)(iii) (requiring HMT to be paid on admission to the FTZ by the party responsible for admission).

A. *Liability upon unloading for HMT on goods admitted to FMZ*

The starting point is the HMT statute. It specifies that HMT is to be paid on "any port use" in "an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. § 4461(a) & (b). The statute specifies that the fee shall be paid by—

> (A) in the case of cargo entering the United States, the importer,
> (B) in the case of cargo to be exported from the United States, the exporter, or
> (C) in any other case, the shipper.

26 U.S.C. § 4461(c). Liability attaches, for port use other than exportation, "at the time of [cargo] unloading." 26 U.S.C. § 4461(c)(2)(B).

Congress expressly exempted certain port use from the fee. Congress created a "[s]pecial rule for Alaska, Hawaii, and possessions." 26 U.S.C. § 4462(b). *See Amoco*, slip op. at 14–15 (given the dependence of Alaska and Hawaii on shipping, the exemption equalizes burdens among the states). Congress also expressly exempted "bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. § 4462(d)(1). The facts of this matter give rise to neither exemption and the statute does not include specific exemption for cargo that is admitted into a foreign trade zone after unloading at a covered port.

As there is no express exemption applicable to its goods in the act establishing the HMT, plaintiff must rely on the FTZ statute to provide relief. That relief is available only if the HMT is a customs duty.

As recently stated, however, in *Texport Oil Co. v. United States*, Nos. 98–1352, 98–1353, 98–1373, 1999 WL 538186, at *6 (Fed. Cir. July 27, 1999), "The HMT is a generalized Federal charge for the use of certain harbors." It is also codified in the Internal Revenue Code. It is not by its nature a customs duty. Further, by itself, 26 U.S.C. § 4462(f)(1) does not make the HMT a customs duty. It merely states, in relevant part:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter

> (and in respect of persons liable therefor) as if such tax were a customs duty.

To treat something for administration and enforcement, as something else, does not make it that other thing for all purposes. Congress could easily have said the HMT was a "customs duty" or a "customs duty for all purposes"; it did not do so.

The next issue is whether 19 U.S.C. § 1528 provides the necessary link. It states, in relevant part:

> No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision to the effect that it shall be treated as a duty imposed under the customs laws.

As the previous discussion indicates, Congress did not designate the HMT a customs duty. Is it enough that it is treated as a duty for administration and enforcement? The answer is "no." To be treated as a duty for purposes of the Customs laws denotes a much broader and more substantive treatment than treatment for mere administration or enforcement purposes. *See U.S. Shoe Corp. v. United States*, 20 CIT 206, 208 (1996) (purpose of 26 U.S.C. § 4462(f)(1) was to specify which agency has responsibility for collecting and processing HMT payments).

Plaintiff also ignores the purpose of § 1528. Its purpose is "to make it clear that preferences and exemptions applicable to customs duties [are not applicable] to internal revenue taxes unless Congress expressly [says] so." *United States v. Westco Liquor Prods. Co.*, 38 CCPA 101, 107 (1951). Congress has not said expressly that FTZ exemptions are applicable to the HMT. The language of 26 U.S.C. § 4462(f)(1) does not satisfy the express language requirement of 19 U.S.C. § 1528. *Cf. Chicago Heights Distrib. Co. v. United States*, 55 Cust. Ct. 254, 259 (1965) (distinguishing "collection purposes" from an "exemption" or "preference" covered by § 1528).

Furthermore, plaintiff's construction is at odds with the purpose of the HMT. Although constructed as an *ad valorem* tax on merchandise, the purpose of the HMT is to charge for port use. *See Texport*, 1999 WL 538186, at *3. The HMT applies whether the goods are exported, imported or shipped between domestic ports. *See id.* To have goods escape the HMT,[4] even though the port use is the same as for other goods, is not

[4] Under plaintiff's interpretation goods may "escape" the HMT because those products entering the FTZ duty-free need not be later imported into the Customs territory of the United States. *See, e.g., Citgo*, 83 F.3d at 399 ("a company that ships raw materials into a foreign-trade zone, processes the raw materials into finished products, and then exports the finished products is not required to pay duties on the raw materials, as they are deemed never to have entered the customs territory of the United States.").

within the intent of Congress.[5] In addition, to further its purpose, Congress provided that the HMT is to attach at the time of unloading (except for exports). 26 U.S.C. § 4461(c)(2)(B). To delay liability until the goods (as entered or transformed) leave the FTZ and *perhaps* enter the United States Customs territory conflicts with this express provision.[6]

Accordingly, the court concludes the HMT must be paid on goods unloaded at covered ports for admission into FTZs, in accordance with 19 C.F.R. § 24.24(e)(2)(iii). The only question remaining is whether the payor specified in 19 C.F.R. § 24.24(e)(2)(iii) is the one provided by statute.

B. *Person responsible for HMT on merchandise admitted into FTZ*

The answer to the question now posed depends in part on whether merchandise admitted into an FTZ is cargo "entering the United States." 26 U.S.C. § 4461(c)(1)(A). In such a case the HMT is to be paid by the "importer." If it is not, the HMT is to be paid by the "shipper." 26 U.S.C. § 4461(c)(1)(C).[7]

If the statute stated "entering the Customs Territory of the United States," this matter would be largely resolved. The goods, not being unloaded for immediate entry into the United States Customs Territory, but being an "other case," would give rise to shipper liability. Of course, the statute dispenses with these fine words of art and merely states "entering the United States." At first, it is not easily decipherable whether Congress meant the geographical United States or its Customs Territory. The word "entering," which is common Customs parlance, implies that the Customs Territory is meant, but it is a mere implication, and not a strong one at that. As defendant points out, the word "enter" has also been used in reference to admission to an FTZ. *See e.g.*, *Nissan Motor Mfg. Corp.*, 12 CIT at 744, 693 F. Supp. at 1189 ("right to enter production machinery into [a] zone without paying duty."); *see also* S. Rep. No. 81–1107, at 1 (1949), *reprinted in* U.S.C.C.A.N. 2533, 2533 (referring to merchandise "entered" into an FTZ).

Plaintiff notes on the other hand, that for several excise tax purposes "United States" is defined to include specifically FTZs. *See* 26 U.S.C. §§ 4612(a)(4)(C) (1994) and 4682(e)(2) (1994). It also notes that there is no specific inclusion of FTZs in the more general definition of "United States" found at 26 U.S.C. § 7701(a)(9) (1994). This is a strong argument. Congress clearly knows how to include FMZs in the definition of the United States for tax purposes, if it so chooses.

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[5] The one exception to this general intent states that the Harbor Maintenance Tax "shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country." 26 U.S.C. § 4462(d)(1). Legislative history supports the conclusion that this exception addressed particularly competitive concerns not implicated by the issue at hand. S. Rep. No. 228, at 229–30 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6742 (exempting "bonded cargo entering the U.S. for transportation and direct exportation to a foreign country. This exemption does not apply (a) if Canada imposes a similar port use charge or (b) to U.S. ports (or classes of cargo) if the mandated cargo diversion study * * * shows that the charge is not likely to result in a significant diversion of cargo or that the nonapplicability of the charge to a given U.S. port would cause economic harm to another U.S. port.").

[6] Plaintiff's contention that HMT is *paid* quarterly, not at the time of unloading, is irrelevant. Liability attaches at unloading, before goods can be made into new products in the FTZ.

[7] The court also does not decide whether liability attaches if bonded sealed merchandise enters an FTZ. This case does not present such a factual scenario. Nor is the court concerned as to whether Customs' forms support the court's reading of the statute. The forms, like the regulations, must conform to the statute, not the converse.

Further, who the "importer" is when there is no actual importation or attempted importation is a somewhat difficult question to answer. Customs argues that its regulations answer the query by defining importer as "the person * * * responsible for bringing merchandise into the zone." 19 C.F.R. § 24.24(e)(2)(i). In fact, the regulations do not state that this is a definition of "importer." Customs' general regulation does not include this as a category of "importer."[8]

As HMT must be paid on the FTZ admissions, one might ask, who pays the HMT if there is no "importer" for FTZ admissions? As indicated, except for imports and exports, the shipper is liable for HMT. 26 U.S.C. § 4461(c)(1)(C). With regard to domestic shipments, Customs' regulations indicate a shipper is the party paying the freight. 19 C.F.R. § 24.24(e)(1)(i). As a shipper is a person responsible for procuring movement of goods,[9] this regulatory definition comports with common meaning. Unlike "importer," there is no general regulatory definition of "shipper."

The person paying the freight, however, may be either the seller or buyer.[10] With domestic shipments, this creates no problem, but as to shipments into an FTZ a collection problem might arise if the person responsible for the freight is interpreted to be the foreign seller.[11]

The parties declined to brief the issue of shipper liability and have not advised if the plaintiff paid the freight on the FTZ admissions at issue, or whether the sales contracts placed responsibility for freight with the seller. In any case, the court doubts that any reasonable interpretation of the statute would permit the shifting of liability, by means of a simple contractual arrangement, beyond Customs' practical ability to collect the HMT.

In accordance with Customs' broad authority to design procedures for collection of HMT, it may be permissible for Customs to require that the person responsible for admission to an FTZ assure that the HMT payment is made. This may be so even if another party was responsible, pur-

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[8] 19 C.F.R. § 101.1 (1999) defines importer as:

> [T]he person primarily liable for the payment of any duties on the merchandise, or an authorized agent acting on his behalf.
>
> The importer may be:
>
> (1) The consignee, or
> (2) The importer of record, or
> (3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
> (4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with subpart C of part 144 of this chapter.

[9] Black's Law Dictionary defines "shipper" as:

> One who ships goods to another. One who engages the services of a carrier of goods. One who tenders goods to a carrier for transportation; a consignor. The owner or person for whose account the carriage of goods is undertaken.
>
> Black's Law Dictionary 1378 (6th ed. 1990).

[10] Under a carriage, insurance, and freight ("C.I.F.") contract, the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. Black's Law Dictionary 242. If the contract has a free on board ("F.O.B.") delivery term, the seller ships the goods and bears the expense and risk of loss to the F.O.B. point designated. *Id.* at 642.

[11] One might argue that the buyer always pays the freight, because in a C.I.F. contract the price paid by the buyer includes the freight and in an F.O.B. contract, the freight is paid directly by the buyer. *See* John H. Jackson, William J. Daley, & Alan O. Sykes, Legal Problems of International Economic Relations 54 (3d ed. 1995) (comparing responsibilities under C.I.F. and F.O.B. terms).

suant to contract, for the freight payment, and is, therefore, nominally the "shipper."

The statute is not entirely clear as to which party is responsible for HMT on admissions into an FTZ. In such a case, the court must examine the reasonableness of the agency's interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see also United States v. Haggar Apparel Co.*, 119 S.Ct. 1392, 1400 (1999) (*Chevron* analysis to be applied to Customs classification if Customs promulgates regulation interpreting ambiguous statute). While the interpretation of the statute presented to the court by the government is not particularly convincing, the regulations themselves may reasonably carry out the statute by simply providing that the person responsible for FTZ admission pay the HMT. As indicated, the court is unaware if plaintiff paid the freight charge, in which case plaintiff would be liable, no matter which interpretation of the statute the court accepts.

Accordingly, the parties will inform the court within 20 days hereof if there is agreement as to plaintiff's responsibility for HMT under this opinion. If no further dispute exists, the parties shall submit a form of judgment. If a dispute exists, a briefing schedule shall be submitted.

NOTE: This is to advise that Slip Op. 99–96 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 99–96)

FORMER EMPLOYEES OF KLEINERTS, INC., PLAINTIFFS *v.* ALEXIS HERMAN, UNITED STATES SECRETARY OF LABOR, DEFENDANT

Court No. 98–05–01438

(Dated September 14, 1999)

(Slip Op. 99–97)

RAJINDER PIPES LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ALLIED TUBE & CONDUIT CORP., SAWHILL TUBULAR DIVISION OF ARMCO, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENORS

Court No. 98–07–02504

Plaintiff, Rajinder Pipes Ltd., moves for judgment on the agency record pursuant to U.S. CIT Rule 56.2, challenging the United States Department of Commerce's (Commerce) denial in the final results of an antidumping duty administrative review of plaintiff's claim for an upward adjustment to its export price for import duties not collected on raw materials under an Indian duty drawback program. In denying the adjustment, Commerce determined plaintiff failed to satisfy Commerce's two-prong test required for the grant of a duty drawback adjustment. Defendant, United States, and Defendant-Intervenors, Allied Tube & Conduit Corporation, Sawhill Tubular Division of Armco, and Wheatland Tube Company, oppose the motion.

Held: This Court denies plaintiff's motion and sustains the final determination made by Commerce in *Certain Welded Carbon Steel Pipes and Tubes from India*, 63 Fed. Reg. 32825 (Dep't Commerce 1998) (final admin. review), as amended in *Certain Welded Carbon Steel Pipes and Tubes From India*, 63 Fed. Reg. 39269 (Dep't Commerce 1998) (amended final admin. review), as amended again in *Certain Welded Carbon Steel Pipes and Tubes From India*, 63 Fed. Reg. 66120 (Dep't Commerce 1998) (amended final admin. review), as the Court finds Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law.

(Dated September 17, 1999)

Cameron & Hornbostel LLP (Dennis James, Jr.), Washington, D.C., for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Reginald T. Blades, Jr.); Christine Savage*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

Schagrin Associates (Roger B. Schagrin), Washington, D.C., for defendant-intervenors.

OPINION

CARMAN, *Chief Judge:* Pursuant to U.S. CIT Rule 56.2, plaintiff, Rajinder Pipes Ltd. (Rajinder), moves for judgment on the agency record arguing that the United States Department of Commerce's (Commerce) final determination in *Certain Welded Carbon Steel Pipes and Tubes From India*, 63 Fed. Reg. 32825 (Dep't Commerce 1998) (final admin. review) *(Final Results)*, as amended by *Certain Welded Carbon Steel Pipes and Tubes From India*, 63 Fed. Reg. 39269 (Dep't Commerce 1998) (amended final admin. review) *(Amended Results I)*, as amended again by *Certain Welded Carbon Steel Pipes and Tubes From India*, 63 Fed. Reg. 66120 (Dep't Commerce 1998) (amended final admin. review) *(Amended Results II)*, is not supported by substantial evidence on the record, is unreasonable, and is otherwise not in accordance with law.

Plaintiff does not dispute the corrections of clerical errors effectuated by *Amended Results I* and *Amended Results II*. Rather, plaintiff argues Commerce's determination in *Final Results* was unjustified and unreasonable in finding that Rajinder was unable to provide record evidence required for establishing the first prong of the two-prong test necessary

for the grant of a duty drawback adjustment.[1] Rajinder also argues that Commerce was wrong in failing to apply the second prong of the test. Finally, Rajinder contends that Commerce improperly rejected the information submitted by Rajinder in January 1998 to satisfy the two-prong test.

Plaintiff requests that this Court find that Commerce's denial of an upward adjustment to Rajinder's export price for duties not collected was not supported by substantial evidence on the record, was unreasonable, and was otherwise not in accordance with law. Rajinder also requests this Court remand the matter to Commerce with instructions that the duty drawback adjustment be granted.

Defendant and defendant-intervenors, Allied Tube & Conduit Corporation, Sawhill Tubular Division of Armco, and Wheatland Tube Company (Allied), oppose plaintiff's motion, contending Commerce's determination should be sustained. Defendant and Allied argue that denial of drawback adjustment was proper due to Rajinder's failure to satisfy Commerce's test for eligibility. Also, defendant and Allied maintain that Commerce properly rejected Rajinder's submissions in January 1998 as untimely.

This Court has jurisdiction under 28 U.S.C. § 1581(c) (1994), and for reasons set forth below, denies plaintiff's Motion for Judgment Upon An Agency Record and sustains Commerce's determination in the *Final Results,* as amended by *Amended Results I* and *Amended Results II.*

BACKGROUND

On June 19, 1997, Commerce initiated a review of carbon steel pipes and tubes from India. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 62 Fed. Reg. 33394 (Dep't Commerce 1997). Rajinder claimed on Commerce's initial questionnaire that it was eligible for an upward adjustment to its export price for import duties not collected on account of its steel and zinc imports to India. Rajinder's claim was based upon 19 U.S.C. § 1677a(c)(1)(B) (1994) which directs Commerce to increase the price used to establish the export price and constructed export price by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States."

Commerce sent Rajinder a supplemental questionnaire in which it stated it was unclear how Rajinder had determined the duty drawback amounts and requested a step-by-step description of Rajinder's calculations. Commerce requested Rajinder:

> explain and provide supporting evidence (a) demonstrating how the payment of import duties and the receipt of duty drawback are

[1] The two-prong test Commerce considers when deciding whether to grant a duty drawback adjustment is:

> (1) whether the import duty and rebate are directly linked to, and dependent upon, one another; and (2) whether the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product.

E.I. DuPont de Nemours & Co. v. United States, 17 CIT 1266, 1271, 841 F. Supp. 1237, 1242 (1993) (quoting *Carlisle Tire & Rubber Co. v. United States*, 11 CIT 168, 171, 657 F. Supp. 1287, 1289 (1987)).

> directly linked to and dependent upon one another, and (b) demonstrating that there were sufficient raw materials to account for the duty drawback you received on the final exported products. In addition, please provide a copy of the Advance License to which you subscribed.

(Rajinder Supplemental Questionnaire, Plaintiff Rajinder Pipes Ltd.'s Appendix to Memorandum of Points and Authorities (PA) at 14.) Rajinder responded by providing a narrative explanation of the method it used to calculate the duty drawback adjustment amount and providing a copy of Rajinder's Advance Licences.[2]

The Advance License documents submitted by Rajinder authorize it to import a specific amount of hot rolled carbon steel and zinc duty free, provided a conforming amount of galvanized steel pipes and tubes are exported within twelve months of the date of issue of the advance license. Furthermore, the license requires the material imported "be useable for the types of pipes and tubes exported." (Plaintiff's Motion for Judgment on the Agency Record Pursuant to Rule 56.2 (RAJ) at 18.) If Rajinder fails to fulfill its export obligation, it must pay Indian Customs the import duty not collected by reason of the license which is proportionate to the quantity of pipes and tubes not exported under the license. In order to prove that it has met its obligations under the license, Rajinder must submit quarterly reports to Indian Customs that detail the goods imported, manufactured, and exported under the license.

On December 3, 1997, Commerce informed Rajinder it intended to verify Rajinder's factual submissions and forwarded a Verification Outline asking Rajinder to:

> [P]rovide source documents demonstrating that the import duty and rebate are directly linked to, and dependent upon, on [sic] another and demonstrating that there were sufficient imported raw materials to account for the drawback received on the exported product.

(Verification Outline, PA at 43–44.) During verification, Commerce reviewed Rajinder's duty drawback calculations and verified the numbers finding no discrepancies. Commerce noted the numbers were subject to change as Indian Customs had not physically verified the quantity of steel coil. Commerce also learned Rajinder did not import any zinc during the period of review but expected a shipment of zinc after verification. Rajinder told Commerce that it would submit additional documentation for duty free imports of steel coil and zinc sometime prior to publication of the results of Commerce's preliminary review. In response, Commerce officials stated that the deadline for submitting new information for the record of the administrative review had passed,

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[2] Under the Indian Advance License program, exporters of certain goods can apply for a license allowing them to import into India, duty free, raw materials used in the production of the exported goods. The exemption for the imported duties is based on the amount of the imported products used in the production of the exported products. The "right to import duty free accrues to the company as soon as it exports and receives the license," (Rajinder Supplemental Questionnaire Response, Plaintiff Rajinder Pipes Ltd.'s Appendix to Memorandum of Points and Authorities (PA) at 17), and "the importation may take place after exportation of goods," (Rajinder Questionnaire Response, PA at 11), so long as the importation occurs within the time-frame specified by the license.

but Rajinder "should do what they feel is in their best interest and that the Department would make a decision accordingly." (Verification Report, PA at 46.)

On January 14, 1998, Rajinder submitted copies of the import pages from its Duty Exemption Entitlement Certificate (DEEC) book.[3] Rajinder claimed the pages demonstrated Rajinder imported zinc and steel coil. On January 26, 1998, Rajinder submitted additional documents related to the import of zinc.

In response to Rajinder's submissions, Commerce sent letters dated January 14 and 15, 1998 to Rajinder stating that, at verification, Commerce had expressly indicated that the deadline for the submission of new materials passed on December 16, 1997. Because Rajinder submitted new information after that date, Commerce rejected the information as untimely.

On February 9, 1998, Commerce issued the preliminary results of its administrative review, *see Certain Welded Carbon Steel Standard Pipes and Tubes From India*, 63 Fed. Reg. 6531 (Dep't Commerce 1998) (preliminary admin. review), denying Rajinder's duty drawback adjustment. Commerce explained in its Preliminary Results Memorandum that it denied Rajinder's claim because Rajinder failed to satisfy Commerce's two-prong test. Regarding the first prong, Rajinder failed to provide "record evidence" of the link between rebate and import duty. (Preliminary Results Memorandum (Memorandum), PA at 63 (emphasis omitted).) Regarding the second prong, Rajinder's attempt to supplement the record with January 1998 submissions was rejected as untimely. In June 1998, Commerce released the final results of its administrative review, denying Rajinder's arguments and stating Rajinder failed the test for duty drawback adjustments because it "did not establish a direct link between the import duty and the drawback Rajinder claimed it received." *Final Results*, 63 Fed. Reg. at 32829. On July 16, 1998, Rajinder timely filed this action.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff, Rajinder, claims the first prong of Commerce's two-prong test is misapplied where, as here, non-collection of duties is the method for duty drawback. This is true, plaintiff argues, because non-collected duties "must *per force* be 'directly related' to the duties that were not, but otherwise would have been, paid since they are one and the same." (RAJ at 15 (emphasis in original).) To satisfy this prong, Rajinder argues, all it need show is that it was a participant in a duty drawback

[3] Indian Advance Licenses come with a Duty Exemption Entitlement Certificate (DEEC) book. The DEEC book is divided into two parts, one for imports and one for exports. The export pages of the DEEC book, copies of which were submitted by Rajinder in its response to Commerce's supplemental questionnaire, describe goods manufactured and exported pursuant to the license and are signed by Indian Customs. The book's import pages, which were *not* initially submitted by Rajinder in its response to Commerce's supplemental questionnaire, describe goods imported into India duty free pursuant to the licenses and also are signed by Indian Customs.

The DEEC book import pages were apparently not available at verification because they were in the possession of Indian Customs who was physically verifying the quantity of steel coil imported duty free by Rajinder under the Advance License program. Additional copies of the same papers were sent to Commerce on January 20, 1998.

scheme, it imported and exported merchandise, and no duty was collected. Rajinder claims it satisfied this prong by providing general information regarding how duty drawbacks work in India, supplying copies of its Advance Licenses, submitting export pages from its DEEC book, and supplying bills of entry for the raw material into India. When the above documents are viewed together, the first prong of Commerce's test is satisfied, and Rajinder argues it was unreasonable for Commerce to rule otherwise.

Additionally, Rajinder contends, Commerce reinterpreted the proof requirements for prong one of its test for duty drawback adjustments without providing Rajinder sufficient notice. In the Verification Outline, Rajinder argues, Commerce requested Rajinder document a link between rebate and import duty; however, in *Final Results*, Commerce stated Rajinder had to provide proof demonstrating a link between the exempted import duty and the exportation of the merchandise. Notwithstanding the changed proof requirements, however, Rajinder argues it satisfied the revised test with the materials provided prior to verification.

Regarding the second prong, Rajinder argues the record proves Rajinder established that it had sufficient imports for the adjustment claimed. The amount of raw material imported during the relevant time period, according to Rajinder, is significantly greater than the amount of finished pipe exported into the United States. Therefore, the record shows sufficient imports to satisfy the amount of duty drawback adjustment claimed.

Although Rajinder argues the import pages of the DEEC book were not necessary to satisfy Commerce's duty drawback test, it submitted them on January 14 and 20, 1998. Rajinder claims that if Commerce deemed the DEEC book's import pages to be essential, it should have informed Rajinder that without the pages the drawback adjustment would be denied. Otherwise, Rajinder had no way of knowing the importance of those pages because they were not *specifically* requested, and they were not logically necessary to prove Rajinder's case. Moreover, Rajinder did submit the DEEC import pages when the pages were returned from Indian Customs. Given that the documentation Commerce sought was with Indian Customs at the time Commerce was seeking it, Rajinder argues that once the documentation became available, Commerce should have relied on regulations which allow the Secretary of Commerce to take information at any time.[4] Nevertheless, Rajinder claims it proved all versions of Commerce's test with the material already in the record.

B. *Defendant*

Defendant, United States, contends Commerce's denial of plaintiff's claim for a duty drawback adjustment was justified because Rajinder did

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[4] The regulation to which Rajinder refers states, "the Secretary may request any person to submit factual information at any time during a proceeding." 19 C.F.R. § 353.31(b)(1) (1997).

not satisfy the two-prong test. Specifically, Rajinder failed to demonstrate the required link between the import duty and the drawback received and to prove that it imported sufficient material to account for the drawback it received. Defendant argues in circumstances where the duty drawback system involves the non-collection of duties, Commerce has interpreted the first prong of the test to require a showing of whether "import duties were actually not collected by reason of the exportation of the subject merchandise to the United States.[5]" (Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record (COM) at 16 (citation omitted).)

Defendant claims Rajinder's documents provided insufficient proof of a link between the import duty and the duty drawback. The Advance Licenses merely allowed plaintiff to *request* an exemption from import duties for steel and zinc, and therefore were not by themselves proof from Indian Customs that there was a link between the actual exempted import duties and the exported merchandise. Moreover, defendant points out that the Court has held "the burden of producing information to assist Commerce in determining whether a respondent is entitled to a duty drawback adjustment lies with the respondent, not Commerce." (COM at 20 (citing *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1090, 834 F. Supp. 1374, 1383 (1993) (citation omitted)).) Defendant also argues Commerce properly rejected plaintiff's post-verification submissions because they were submitted after the deadline for the submissions established by regulation.

C. *Defendant-Intervenors*

Defendant-Intervenors, Allied, oppose plaintiff's Motion for Judgment Upon An Agency Record because, according to Allied, Commerce's rejection of Rajinder's claimed duty drawback adjustment is supported by substantial evidence and is otherwise in accordance with law. Allied asserts Rajinder failed to satisfy prong one of Commerce's test because it failed to explain the nature of its participation in the drawback scheme, and it did not establish a direct link between export sales and the non-collection of import duties. A detailed explanation was necessary because Rajinder had yet to make any importations resulting in the non-collection of import duties, and, on its face, the statute does not permit an adjustment under those circumstances. Regarding prong two, Allied asserts that Rajinder failed to demonstrate it imported sufficient hot-rolled steel to correspond to the exports on which it was seeking an adjustment. Additionally, Allied notes that Rajinder had not submitted any documentation showing Rajinder had actually imported zinc during the period of review. Allied also asserts that the DEEC book import pages were submitted untimely, were illegible, and could not be verified.

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[5] In its brief in opposition, defendant appears to quote the language of the drawback statute, 19 U.S.C. § 1677a(c)(1)(B), in referring to prong one of the standard two-prong test for duty drawback. In footnote three of defendant's brief, however, defendant uses different language to describe what Commerce examines in prong one in non-collection programs. Commerce examines "whether there is a link between the non-collected duty and the exportation of merchandise." (Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record (COM) at 16 n.3.)

Finally, Allied asserts that Rajinder was on notice that it had to submit such documentation but chose not to submit the import pages.

STANDARD OF REVIEW

When reviewing a final determination by Commerce, this Court must sustain the determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951) (citation omitted), *quoted in Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). For the purposes of judicial review, the evidence is limited to the administrative record. *See Toyota Motor Sales, U.S.A., Inc. v. United States*, 15 F. Supp. 2d 872, 877 (CIT 1998). Whether Commerce properly excluded plaintiff's untimely submissions from the administrative record depends on "whether Commerce complied with the statute defining the administrative record for review." *Kerr-McGee Chem. Corp. v. United States*, 955 F. Supp. 1466, 1471 (CIT 1997).

DISCUSSION

A. *The Scope of the Administrative Record*

Rajinder argues Commerce should have accepted its submissions of January 1998, which included the DEEC import pages, and considered the documents as part of the administrative record. Plaintiff's argument lacks merit. Factual information for Commerce's consideration in an administrative review:

> shall be submitted not later than: * * * the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review; * * * (3) The Secretary will not consider in the final determination or the final results * * * any factual information submitted after the applicable time limit.

19 C.F.R. § 353.31(a)(1), (3) (1997). Previously, this Court has sustained Commerce's rejection of new factual information submitted untimely pursuant to its regulations. *See, e.g., Mantex, Inc. v. United States*, 17 CIT 1385, 1409, 841 F. Supp. 1290, 1310 (1993). As the January submissions were filed after the December 16, 1997 deadline[6] and as plaintiff admits the documents were submitted untimely[7], this Court finds Commerce properly rejected the January submissions as untimely.

Notwithstanding the untimeliness of the submissions, Rajinder argues Commerce should have accepted the documents under 19 C.F.R.

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[6] Defendant states in its brief that "Rajinder's deadline for submission of factual information was December 16, 1997, which was 180 days after publication of the notice of initiation." (COM at 13.)

[7] Rajinder specifically states it "cannot deny that, although it did submit the above-noted information and documentation before the preliminary results, it did not submit them within 180 days of the notice of initiation." (Plaintiff Rajinder Pipes Ltd.'s Reply to Defendant's and Defendants-Intervenors' Oppositions to Plaintiff's Motion for Judgment on the Agency Record Pursuant to Rule 56.2 at 14.)

§ 353.31(b)(1) (1997) which allows for the submission of information "at any time" during the procedure. This regulation, however, only allows for the submission of information "at any time," when Commerce specifically "requests" a party to submit factual information.[8] Rajinder admits Commerce did not specifically request the January submissions.[9] Therefore, this Court finds Commerce properly rejected the January submissions as untimely.

B. *Duty Drawbacks Under the Tariff Act of 1930*

The antidumping laws of the United States allow Commerce to issue antidumping duty orders upon imported merchandise which is sold or likely to be sold at less than fair value. 19 U.S.C. § 1673 (1994). In making its determination, whether the merchandise is sold in the United States at less than fair value, Commerce must compare the price of the merchandise in the United States (export price) and the price of the merchandise in a foreign market (normal value).[10] *See Huffy Corp. v. United States*, 10 CIT 214, 215, 632 F. Supp. 50, 52 (1986) (citing 19 U.S.C. § 1673 (1982)). The export price is a value calculated by considering the price at which the merchandise is exchanged between parties in arm's length transactions and any adjustments which are necessary so "that [the] value [of the export price and normal value] can be fairly compared on an equivalent basis." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571–73 (Fed. Cir. 1983). If Commerce determines that the normal value exceeds the export price by a certain percentage, that difference or margin is the basis upon which Commerce assesses antidumping duties on investigated entries. *See* 16 U.S.C. § 1675(a)(2) (1994); *Far East Mach. Co. v. United States*, 12 CIT 428, 430, 688 F. Supp. 610, 611 (1988).

One type of adjustment to export price is known as a duty drawback. Typically, this adjustment increases the export price in light of export rebate programs undertaken by foreign countries to boost exports and increase manufacturers' cost competitiveness in foreign markets. *See* Chiang-feng Lin, *Investment in Mexico: A Springboard Toward the NAFTA Market-An Asian Perspective*, 22 N.C. J. INT'L L. & COM. REG. 73 (1996). This upward adjustment to export price reduces any margin on which antidumping duties are assessed, thereby reducing or eliminating antidumping duties. Under a standard duty drawback or rebate program, import duties paid on merchandise that will ultimately be exported to the United States are rebated to the exporter by the foreign country upon exportation. The export price then may be adjusted by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of

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[8] 19 C.F.R. § 353.31(b)(1) (1997) states, "[n]otwithstanding paragraph (a) of this section [*i.e.*, the provision identifying the 180 day submission requirement], the Secretary may request any person to submit factual information at any time during a proceeding."

[9] Rajinder states, "the DEEC import pages were not specifically requested." (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Judgment on the Agency Record Pursuant to Rule 56.2 (RAJ) at 30.)

[10] In 1994, the Uruguay Round Agreements Act substituted the term "export price" for the term "United States price" and the term "normal value" for the term "foreign market value." *See Uruguay Round Agreements Act*, Pub. L. No. 103–465, §§ 233(a)(1), (2)(A), 108 Stat. 4809, 4898 (Dec. 8, 1994).

the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B) (1994).

In order to receive a duty drawback adjustment under a standard rebate program, Commerce has interpreted the statute to require an importer to satisfy a two-prong test. This Court has upheld Commerce's interpretation of the statute as requiring that:

> [When] determining whether such an adjustment should be made, Commerce considers (1) whether the import duty and rebate are directly linked to, and dependent upon, one another; and (2) whether the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product.

E.I. DuPont de Nemours & Co. v. United States, 17 CIT 1266, 1271, 841 F. Supp. 1237, 1242 (1993) (quoting *Carlisle Tire & Rubber Co. v. United States*, 11 CIT 168, 171, 657 F. Supp. 1287, 1289 (1987)). In applying this test in the context of a standard rebate program, Commerce has, in the first prong of the test establishing a link between an import duty and a rebate, focused "on the drawback program itself, [] requir[ing] a showing that entitlement to rebate is dependent upon the payment of duties." *Far East*, 688 F. Supp. at 612. The second prong, demonstrating sufficient imports of imported raw materials to account for the duty drawback received on the exports of the manufactured product, concerns "the specific application of the drawback program to the firm claiming the adjustment." *Id.*

As previously stated, the drawback statute, 19 U.S.C. § 1677a(c)(1)(B), also allows a duty drawback adjustment to export price for an amount of any import duty "which [may] have not been collected, by reason of the exportation of the subject merchandise to the United States." *Id.*; *see, e.g.*, *Carbon Steel Wire Rope From Mexico*, 63 Fed. Reg. 46753, 46756 (Dep't Commerce 1998) (final admin. review) (stating petitioner's argument that the exporter has to actually pay and receive a rebate in order to qualify for duty drawback adjustment is contrary to the plain language of the statute and the Department's long standing practice). Under this type of non-collection program, countries allow duty free importation of goods if those goods will ultimately be used in exports. Commerce has recognized this type of non-collection of duties program as having the same purpose as that of a standard rebate program. Specifically, Commerce has noted that the Indian non-collection program, which is facilitated by Advance Licenses, is like a rebate program because both programs "allow companies to import, net of duty, raw materials which are physically incorporated into the exported products." *Certain Iron-Metal Castings From India*, 62 Fed. Reg. 32297, 32306 (Dep't Commerce 1997) (final CVD admin. review); *see also Certain Iron-Metal Castings From India*, 60 Fed. Reg. 44843, 44846 (Dep't Commerce 1995) (final CVD admin. review); *Steel Wire Rope From India*, 56 Fed. Reg. 46292, 46293 (Dep't Commerce 1991) (final affirmative CVD det.); *Bulk Ibuprofen From India*, 56 Fed. Reg. 66432, 66433

(Dep't Commerce 1991) (prelim. affirmative CVD det.). Commerce, in making its adjustment determinations on non-collection programs, has applied the same two-prong duty drawback test as it has in standard rebate programs. *See Certain Welded Carbon Standard Steel Pipes and Tubes From India*, 62 Fed. Reg. 47632, 47633 (Dep't Commerce 1997) (final AD admin. rev.).

Plaintiff now contends that it did not receive adequate notice that Commerce specifically needed the DEEC import pages to satisfy prong one of Commerce's duty drawback test. It is undisputed, however, that plaintiff did have adequate notice that Commerce required satisfaction of the two-prong test in order to receive its requested duty drawback. As previously stated, Commerce has previously applied the two-prong test in prior cases involving Rajinder and the Indian Advance License program. *See id.* Moreover, in this case, Commerce repeatedly requested Rajinder to satisfy the two-prong test. Thus, plaintiff cannot claim it lacked adequate notice as to what proof was required. Further, with respect to the specificity of Commerce's request, it is not Commerce's job to identify the documents necessary for satisfaction of the two-prong test. It is well established that the burden of producing information to satisfy Commerce's test lies with the respondent not Commerce. *See, e.g., Primary Steel, Inc. v. United States*, 17 CIT 1080, 1090, 834 F. Supp. 1374, 1383 (1993) (citing *Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). This Court finds Rajinder's argument regarding notice is without merit.

C. *Commerce's Final Determination Is Supported by Substantial Evidence*

In this case, Commerce again considered duty drawback adjustment under the Indian non-collection program. In making its determination, Commerce applies the standard two-prong duty drawback test. *See Final Results*, 63. Fed. Reg. at 32829.

With respect to Rajinder's zinc imports, the Court finds Commerce's determination that Rajinder did not qualify for an adjustment is supported by substantial evidence on the record. By its own admission, Rajinder did not submit timely documentation to substantiate its importation of zinc during the period of review in Commerce's investigation.[11] (*See* RAJ at 35.) Consequently, Rajinder was ineligible for a duty drawback adjustment regardless of whether zinc imports were exported to the United States pursuant to its Advance License.

With respect to Rajinder's steel imports, Commerce denied Rajinder's request for duty drawback because it failed to establish a "direct link between the import duty and the drawback Rajinder claimed it received." *Final Results,* 63 Fed. Reg. at 32829. Because the record submitted by Rajinder does not show the necessary link, this Court finds Commerce's determination is supported by substantial evidence on the record. The

[11] Substantiation of Rajinder's claim for duty drawback adjustment relating to its zinc imports was allegedly contained in the DEEC Book import pages and other information that were appropriately rejected by Commerce as untimely. *See supra* Part A; (*see* RAJ at 35.).

record evidence submitted by Rajinder indicates that an Indian Advance License grants Rajinder twelve months in which to export the finished product and import the raw material into India or face a duty. The DEEC book's export pages show that goods conforming to those specified on the license were exported under Rajinder's Advance License. The Indian bills of entry show that steel conforming or similar to the type of steel allowed to enter India duty free under Rajinder's Advance License, in fact, entered India duty free. In sum, the documents show that Rajinder imported raw material into India duty free and that Rajinder, independently, exported finished products pursuant to an Advance License. These documents *do not* show, however, that the steel imported duty free by Rajinder was "directly linked to, and dependent upon" exportation in accordance with Rajinder's advance licenses. *E.I. DuPont de Nemours*, 841 F. Supp. at 1242 (citing *Carlisle Tire*, 657 F. Supp. at 1289).

On the basis of the documents submitted by Rajinder, Commerce determined that the evidence was not sufficient for Rajinder to satisfy prong one of the test for duty drawback adjustments. This Court agrees. So long as a reasonable mind can accept the evidence as adequate to support Commerce's conclusions, the Court must defer to Commerce's judgment regarding the evidence. *See Rhone-Poulenc, Inc. v. United States*, 20 CIT 573, 575, 927 F. Supp. 451, 454 (1996). Therefore, because this Court finds there was adequate evidence to support Commerce's conclusion regarding the first prong of the test, this Court holds that Commerce's denial of Rajinder's request for a duty drawback adjustment is supported by substantial evidence on the record and is otherwise in accordance with law.

Although the Court sustains Commerce's final determination because the Court finds there was substantial evidence on the record to support Commerce's conclusion that Rajinder failed to prove a link between the import duty and drawback benefit received, the Court notes Commerce's enunciation and application of its two-prong test in this instance is less than a model of clarity. Here, Commerce appeared to vary the proof required for the separate prongs of its test between its Preliminary Results Memorandum and its *Final Results*.[12] In its Preliminary Results Memorandum, Commerce appears to request Rajinder

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[12] In its Preliminary Results Memorandum, Commerce specifically states with respect to prong one:

> Rajinder was not able to provide record evidence that the import duty and the drawback are directly related to one another. In order to satisfy this requirement, Rajinder could have supplemented the record with documentation that demonstrates the manner in which the Indian Advanced Licensing system works (i.e., historically illustrate the link between the rebate received upon exportation of the merchandise and the import duty from which the company is exempted from paying for products that have been or will be imported in the future * * *).

(Preliminary Results Memorandum, PA at 63.) (emphasis omitted).) With respect to prong two, Commerce stated:

> Rajinder attempted to supplement the record on January 20, 1998, with evidence that it received sufficient amounts of imports of the imported raw materials to account for the drawback received on the exported merchandise. However, the submission received was not submitted in a timely manner * * *.

(Id.)

In its *Final Results*, however, Commerce stated that an importer, under the Indian Advance License program, must show that it "prove[d] to Indian Customs that the [imported duty free] goods were used in a product that was or will be exported or the importer of the goods will be liable for the foregone duty." *Final Results*, 63 Fed. Reg. at 32929. Commerce then stated plaintiff needed to provide the "DEEC book" for "without such information there is no established link between the import duty and the drawback." *Id.*

submit general information regarding India's duty drawback program for prong one and Rajinder-specific information, e.g., the untimely information which included the DEEC import pages, for prong two. In the *Final Results*, however, Commerce appears to find that the DEEC import pages, previously sought to prove prong two, are needed to prove prong one of the test. While the DEEC import pages appear to be a means of proving the necessary link under prong one, the Court suggests Commerce better clarify the nature of the proof required for each prong in the future.

Since Rajinder failed the first prong of Commerce's test, it is not necessary for the Court to examine Rajinder's compliance with the second prong, as both prongs of the test must be met in order to receive a duty drawback adjustment.

CONCLUSION

For the reasons discussed above, this Court denies plaintiff's Motion for Judgment Upon An Agency Record. This Court finds that Commerce properly rejected as untimely the January 1998 submissions pursuant to administrative regulations. This Court also finds that Commerce's final determination not to grant a duty drawback adjustment to Rajinder is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, the Court dismisses this action.

(Slip Op. 99–98)

UNITED STATES, PLAINTIFF *v.* PENTAX CORP., ET AL., DEFENDANTS

Consolidated Court No. 96–01–00067

[Defendants' motion for summary judgment based on lack of materiality denied.]

(Dated September 20, 1999)

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer, Kenneth M. Dintzer, William W. Stewart, Jr., Gregory T. Jeager, Ann Loughlin), Saul Perla, Kathleen Bucholtz*, Office of Chief Counsel, United States Customs Service, of counsel, for plaintiff.

Swidler Berlin Shereff Friedman, LLP (James Hamilton, Michael Spafford, Amy Carpenter-Holmes) for defendants.

OPINION

RESTANI, *Judge:* This matter is before the court on defendants' motion for summary judgment, pursuant to USCIT R. 56. Defendants argue that they are not liable for civil penalties under 19 U.S.C. § 1592

(1988)[1] for mismarking of goods because the mismarking did not affect the amount of duties owed or the admissibility of the goods, as required by regulatory materiality standards.

BACKGROUND

The facts of this matter are set forth in *Pentax Corp. v. Robison*, 20 CIT 486, 924 F. Supp. 193 (1996), *rev'd*, 125 F.3d 1457 (Fed. Cir. 1997), *amended*, 135 F.3d 760 (1998). Familiarity with those opinions is presumed. In sum, defendants were responsible for marking and importing cameras into the Customs Territory of the United States between 1987 and 1991. The cameras were marked of Hong Kong origin. For purposes of this motion, it is conceded that the goods should have been marked "made in China." The mismarking was not discovered until after the goods were admitted and liquidated. The goods would have been admitted and dutied at the same rate if they had been marked properly.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582 (1994). *Pentax*, 125 F.3d at 1462. Summary judgment may be granted when "there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law." USCIT R. 56(d).

DISCUSSION

Defendants had previously admitted that the cameras were entered into the United States by means of "material false statements" constituting a violation of 19 U.S.C. § 1592(a). First Am. Answer to First Am. Compl. at ¶ 10. They now seek summary judgment on the basis of lack of materiality. The question of materiality is a legal issue to be decided by the court. *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 209 (1986).

Country of origin is always, or nearly always, material. It has the potential to affect all of Customs' core decisions. False country of origin declarations certainly also affect Customs' record-keeping, which in turn has the potential to affect decisions as to whether to bring unfair trade action, which in turn has the potential to affect duties. Further, the concealed mismarking also has the potential to affect admissibility. Had the mismarking been discovered before release by Customs, the goods would not have been admitted as marked. Remarking, exportation, or destruction, would have been required. 19 C.F.R. § 134.51(a) (1991).[2] If none of these measures were accomplished and if the mismarking had been discovered before liquidation, marking duties would have been assessed. 19 U.S.C. § 1304(f) (1988).

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[1] Although the differences between the 1988 and 1994 version of § 1592 are minimal, the court refers to the 1988 version because the entries at issue occurred between 1987 and 1991.

[2] Section 134.51(a) provided that:

> When articles or containers are found upon examination not to be legally marked, the district director shall notify the importer * * * to arrange with the district director's office to properly mark the article or containers, or to return all released articles to Customs custody for marking, exportation, or destruction.

The 1999 version of 19 C.F.R. § 134.51(a) differs only slightly, by substituting "port director" for "district director."

The court declines to expand the Federal Circuit's decision in *Pentax*,[3] into a holding that mismarking, which makes goods further dutiable or inadmissible, if timely recognized by Customs, is completely immaterial for purposes of 19 U.S.C. § 1592,[4] unless *but for* the mismarking the goods would have been inadmissible or subject to other duties. *See United States v. An Antique Platter of Gold*, No. 97-6319, 1999 WL 498582, at *3-4 (2d Cir. 1999) (rejecting "but for" test of materiality for 18 U.S.C. § 542 and adopting "natural tendency" approach that a "false statement is material * * * if it has the potential significantly to alter the integrity or operation of the importation process as a whole * * *.") (quoting *United States v. Holmquist*, 36 F.3d 154, 159 (1st Cir. 1994)); *see also Rockwell*, 10 CIT at 42, 628 F. Supp. at 210 (holding that the standard for determining whether false statement is material under 19 U.S.C. § 1592(a), is "whether [statement] has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.") (quotation omitted).

If 19 C.F.R. Part 171, App. B, ¶ A (1999)[5] is read to require a *but for* standard, it would conflict with 19 U.S.C. §§ 1304 and 1592,[6] and render these provisions meaningless for mismarking not affecting revenue and not discovered before liquidation. As indicated by the Federal Circuit in *Pentax*, marking duties are not owed in such a situation.[7] The goods also would be admitted finally because liquidation settles the issue of admissibility. *See United States v. Utex Int'l Inc.*, 857 F.2d 1408, 1409 (Fed. Cir. 1988) ("when goods are finally liquidated they are deemed admissible."). If penalties, as well as duties, are not owed, importers seeking to fool Customs or the public by such mismarking may simply lie, conceal the lie, and risk no harm. This cannot be so.

Summary judgment based on lack of materiality is denied.

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[3] *Pentax* held *duties* were not owed under 19 U.S.C. § 1592(d) because the mismarking did not deprive the United States of duties directly. *Pentax*, 125 F.3d at 1463.

[4] Section 1592 provides, in relevant part, "Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—(A) may enter * * * any merchandise into the commerce of the United States by means of * * * any document * * * which is material and false * * *." 19 U.S.C. § 1592(a)(1)(A).

[5] The regulation reads in relevant part:

> (A) Violations of Section 592; Materiality
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, a violation of section 592 occurs when a person, through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States by means of any document, written or oral statement, or act which is material and false, or any omission which is material; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means. A document, statement, act, or omission is material if it has the *potential* to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping, countervailing duty or similar statute, or an unfair act involving patent or copyright infringement. There is no violation if the falsity or omission is due solely to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negligent conduct. (emphasis added)

This current section of the regulations is identical to the 1991 version.

[6] "[T]he purpose of section 1592 was 'to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws.'" *United States v. F.A.G. Bearings, Ltd.*, 8 CIT 294, 296, 598 F. Supp. 401, 403-04 (1984) (citing S. Rep. No. 778, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S.C.C.A.N. 2211, 2229).

[7] By adopting a reading of 19 U.S.C. § 1592 which does not encourage proper marking or proper use of the prior disclosure statute, *Pentax* obviously indicates that the statute needs amendment. Similarly, Customs should amend its regulation which can be misinterpreted to undercut the statutory marking obligation.

(Slip Op. 99–99)

ECKSTROM INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–10–01913

[Commerce's remand determination is sustained.]

(Decided September 20, 1999)

Powell, Goldstein, Frazer & Murphy LLP, (N. David Palmeter, Susan M. Mathews, and *Ronald E. Minsk)* for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Lucius B. Lau); Linda A. Andros,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel, for Defendant.

OPINION

POGUE, *Judge:* On October 28, 1998, in *Eckstrom Industries, Inc. v. United States,* 22 CIT ___, 27 F. Supp.2d 217 (1998) *(Eckstrom I),*[1] this Court remanded certain aspects of the Department of Commerce's ("Commerce" or "the Department") scope determination issued pursuant to 19 C.F.R. § 351.225(k)(1) (1998).[2]

The remand order directed Commerce to reconsider its determination and, if necessary, to conduct a formal scope inquiry pursuant to 19 C.F.R. § 351.225(k)(2) (1998).[3] After conducting the § 351.225(k)(2) inquiry, Commerce affirmed its determination that Eckstrom Industries, Inc.'s ("Eckstrom") *cast* stainless steel butt-weld pipe fittings are within the scope of the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan.[4] *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Determination") at 1–2. Plaintiff Eckstrom objects to Commerce's remand determination, arguing that

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[1] Familiarity with the Court's earlier decision in this case is presumed.

[2] Section 351.225(k)(1) provides,

> [I]n considering whether a particular product is included within the scope of an order * * *, [Commerce] will take into account the following: (1) the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the Commission.

[3] Section 351.225(k)(2) provides,

> When the above [(k)(1)] criteria are not dispositive, the Secretary will further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed.

[4] The original antidumping duty order states,

> The products subject to this investigation are certain stainless steel butt-weld pipe fittings, whether finished or unfinished, under 14 inches inside diameter.
>
> Certain welded stainless steel butt-weld pipe fittings (pipe fittings) are used to connect pipe sections in piping systems where conditions require welded connections. The subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: (1) Corrosion of the piping system will occur if material other than stainless steel is used; (2) contamination of the material in the system by the system itself must be prevented; (3) high temperatures are present; (4) extreme low temperatures are present; (5) high pressures are contained within the system.
>
> Pipe fittings come in a variety of shapes, with the following five shapes the most basic: 'elbows', 'tees', 'reducers', 'stub ends', and 'caps'. The edges of finished pipe fittings are beveled. Threaded, grooved, and bolted fittings are excluded from these investigations. The pipe fittings subject to these investigations are classifiable under subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States (HTSUS).
>
> Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of these investigations is dispositive.

Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 58 Fed. Reg. 33,250 (Dep't Commerce, June 16, 1993) ("Order").

the order applies only to welded pipe fittings, not cast. For the reasons set forth below, Commerce's remand determination is sustained.

BACKGROUND

In *Eckstrom I*, this Court held that the description of the subject merchandise contained in the petition, the initial investigation, and the final determination do not unambiguously include cast pipe fittings within the scope of the Order. *See Eckstrom I*, 22 CIT at ___, 27 F. Supp.2d at 228. Similarly, however, the Court held that the Plaintiff had not adequately demonstrated that the § 351.225(k)(1) criteria are dispositive in excluding cast pipe fittings from the scope of the Order. *See id.* Accordingly, this Court concluded that Commerce's determination that the § 351.225(k)(1) criteria are dispositive was not supported by substantial evidence. Upon remand, Commerce exercised its discretion to initiate a formal scope inquiry pursuant to § 351.225(k)(2). *See* Remand Determination at 1.

In its § 351.225(k)(2) inquiry, Commerce preliminarily determined that Eckstrom's cast stainless steel butt-weld pipe fittings are within the scope of the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan. *See* Remand Determination at 1. Commerce then gave interested parties an opportunity to comment and to address the § 351.225(k)(2) criteria. *See id.* After reviewing the parties' comments and the record, Commerce once again determined that Eckstrom's cast stainless steel butt-weld pipe fittings are within the scope of the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan. *See id.* at 1–2.

STANDARD OF REVIEW

The Court reviews Commerce's scope determination to decide whether it is in accordance with law and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

In determining whether Eckstrom's cast pipe fittings are subject to the Order, Commerce considered the five factors provided for in § 351.225(k)(2). In evaluating the criteria, Commerce is directed to "determine whether [the contested] product is sufficiently similar [to] merchandise unambiguously within the scope of [the] order as to conclude the two are merchandise of the same class or kind." *Wirth Limited v. United States*, 22 CIT ___, ____, 5 F. Supp.2d 968, 981 (1998), *aff'd*, No. 98–1391 (Fed. Cir. Feb. 2, 1999). The Court here addresses Eckstrom's challenges to the § 351.225(k)(2) criteria as considered by Commerce in making its determination.

1. Physical Characteristics

Commerce concluded that Eckstrom's cast pipe fittings are covered under the order because they are made of stainless steel, under fourteen inches in inside diameter and connected by means of a butt-weld. *See* Remand Determination at 6–8. In addition, Commerce determined that

Eckstrom's cast pipe fittings are made from T316L stainless steel, "one of the two grades of stainless steel that the ITC stated are usually used for subject fittings." Remand Determination at 6–7. The evidence in the record clearly supports this determination.

Nevertheless, Eckstrom challenges Commerce's determination, arguing that the evidence clearly establishes that the physical characteristics of cast pipe fittings are different from wrought[5] (or welded) pipe fittings, which are clearly within the order's scope. Eckstrom contends that welded pipe fittings are much stronger than cast pipe fittings, and that "[i]t is this difference in strength that makes cast fittings unsuitable for high-pressure, high-temperature, extremely low-temperature, or contamination-risk applications." Pl.'s Comments on Remand Scope Det. ("Pl.'s Comments") at 5. Second, Eckstrom points out that cast pipe fittings are made to different dimensions than wrought fittings. *See id.* at 6. "In other words, the two products are different sizes and can not [sic] be substituted for one another in the same piping system." *Id.* Moreover, cast pipe fittings are made from a different raw material because the welding and casting manufacturing processes give the same grade of steel, here T316L, different physical properties. *See id.* at n.6. "Thus, [according to Eckstrom,] there is no respect in which the physical characteristics of the two products are the same." *Id.*

Commerce replies that the scope of the order refers to pipe fittings that are used where "corrosion of the piping system will occur if material other than stainless steel is used," thereby suggesting that the strength of the pipe fittings is irrelevant. *See* Def.'s Resp. at 11. With respect to the dimensions of the fittings, Commerce notes that the only dimensional requirements necessary are that the pipe fitting be less than fourteen inches in inside diameter. *See id.*[6]

The Court declines to re-weigh the evidence here. *See Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966) (noting that the substantial evidence standard "frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."). Essentially, Plaintiff highlights the differences between its cast fittings and the fittings unambiguously covered by the Order and urges the Court to reinterpret the record from this standpoint. It is well-established, however, that Commerce has discretion in balancing the § 351.225(k)(2) criteria. *See e.g., Smith Corona Corp. v. United States,* 12 CIT 854, 869, 698 F. Supp.

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[5] "The term 'wrought' distinguishes forged iron or steel pipe from cast-iron pipe." THE MAKING, SHAPING AND TREATING OF STEEL 1019 (William T. Lankford, Jr., et al. eds., 10th ed. 1985). Welded pipe fittings are wrought.

[6] Commerce also argues that "Eckstrom's explanation of the manufacturing process of cast and wrought fittings [is] not illuminating as to the proper interpretation of the scope of the Order, as the scope language does not discuss manufacturing process as a parameter for including or excluding any type of fittings." Remand Determination at 7. Because the Court's affirmation does not rely on this argument, however, the Court declines to address it further.

240, 2.53 (1988).[7] Moreover, under the § 351.225(k)(2) criteria, Commerce need only demonstrate that the general physical characteristics of the products under consideration are "sufficiently similar" in order to conclude that the two are of the same class or kind. *Wirth*, 22 CIT at ____, 5 F. Supp. 2d at 981; *Smith Corona*, 12 CIT at 860–61, 698 F. Supp. at 245–46 (finding that different components constitute physical differences but do not necessarily add up to a different class or kind).

Here, Commerce's focus on size, grade, and the corrosion resistance of stainless steel is sufficient to support its conclusion. Accordingly, the Court finds Commerce's determination with respect to physical characteristics to be supported by substantial evidence.

2. Expectations of the Ultimate Purchaser

Commerce found that pulp and paper companies are the primary customers of cast pipe fittings and that they use these fittings to build process piping systems. *See* Remand Determination at 9. Commerce also determined that "as the subject merchandise is used in a variety of applications, expectations of end-users will not be identical, *i.e.*, expectations will necessarily differ depending upon the use of the product. However, when used in similar applications, *e.g.*, corrosion resistance, the expectations are similar." *Id.* Commerce noted that Eckstrom admits that its cast pipe fittings are used where corrosion of the piping system is a concern, which is one of the factors expressed in the scope of the Order. *See id.* Based on this finding, Commerce concluded that "there is similarity in the expectations of the end[-]users of Eckstrom's cast pipe fittings and fittings subject to the [O]rder." *Id.*

Eckstrom disagrees, arguing that end-users have very different expectations for cast and welded pipe fittings. *See* Pl.'s Comments at 7. The ultimate purchasers of Eckstrom's cast pipe fittings are generally pulp and paper companies; the ultimate purchasers of its welded pipe fittings are semiconductor manufacturers. *See id.* At 6. "Welded pipe fittings are stronger and suitable where there are additional concerns about contamination, extreme-temperature, and extreme-pressure in the piping system. * * * Cast fittings are weaker, less reliable and less expensive." *Id.* at 7. In essence, Eckstrom contends that Commerce simply identifies a generality—that both fittings are used in piping systems where corrosion is a concern—and then asserts that this generality encompasses the expectations of end-users for both products. *Id.* at 8.

In response, Commerce reiterates the position taken in its Remand Determination. There, Commerce concluded that the expectations of the end-users do not have to be identical for the cast pipe fittings to be covered by the scope of the order. *See* Remand Determination at 9. Commerce maintains that even if the expectations vary, there is still a gener-

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[7] In *Smith Corona*, the court applied what were known as the Diversified Products criteria from *Diversified Products Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). The Diversified criteria were subsequently codified in the federal regulations and are currently found at 19 C.F.R. § 351.225(k)(2). Although the § 351.225(k)(2) and Diversified Products criteria do not conform exactly, they are substantially similar such that the reasoning in *Smith Corona* still applies. *Cf. Wirth*, 22 CIT at ____, 5 F. Supp.2d at 973 n.4.

al application that encompasses similar expectations, *i.e.*, piping systems where corrosion resistance is desired. *See id.*

To properly examine § 351.225(k)(2)(ii), it is necessary to look at both what the expectations are and who the ultimate purchasers are. *Cf. Diversified Products*, 6 CIT at 162, 572 F. Supp. at 889. with respect to the latter, Eckstrom acknowledges that its cast pipe fittings are sold to pulp and paper companies. *See* Pl.'s Comments at 6. Similarly, Commerce notes that the ITC determination in this case referred to pulp and paper companies as one of the end-users of the subject merchandise under consideration. *See* Remand Determination at 8–9. Meanwhile, Eckstrom points out that it sells its welded pipe fittings to high-tech semiconductor manufacturers. *See* Pl.'s Comments at 6. Nonetheless, record evidence also indicates that some of Eckstrom's customers have purchased both cast and welded pipe fittings. *See* Pl.'s Dec. 16, 1998, Questionnaire Resp. at 17. Based on the record evidence as a whole, this Court finds that Commerce's determination that cast and welded pipe fittings share similar ultimate purchasers is supported by substantial evidence.

With regard to expectations, Commerce concludes that purchasers of cast and welded pipe fittings have similar expectations because both are expected to prevent corrosion of piping systems. *See* Remand Determination at 9. Eckstrom argues that the two products would never be substitutes for each other in the same piping system and thus the purchasers of each have completely different expectations.[8] *See* Pl.'s Comments at 6–8.

The Court does not find that Plaintiff's arguments establish that Commerce's conclusion that cast and welded pipe fitting purchasers have similar expectations is not supported by substantial evidence. In *Wirth*, the court upheld Commerce's determination that purchasers of CST profile slabs and carbon steel plate had similar expectations, even though there were uses for which the products were not substitutes. *See Wirth*, 22 CIT at ____, 5 F. Supp. 2d at 981. Furthermore, in *Smith Corona*, 12 CIT at 866, 698 F. Supp. at 250, the court looked at the motivations of the ultimate purchasers to conclude that consumers who purchase typewriters with text memory are in essence purchasing typewriters with an added feature, not a different product altogether.

Here, welded pipe fittings, unlike cast pipe fittings, have characteristics that enable them to be used under high pressure, high temperature, or contamination sensitive conditions. Nevertheless, they also share similar characteristics with cast pipe fittings in that they have similar dimensions, are made of the same material, connect by means of a butt-weld, and are expected to prevent corrosion of piping systems.

It is not the task of this Court to review the record evidence to determine whether a different conclusion could be reached, but to determine whether Commerce's conclusion is supported by substantial evidence.

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[8] Eckstrom states that "[w]elded pipe fittings are stronger and suitable where there are additional concerns about contamination, extreme-temperature, and extreme-pressure in the piping system," while "[c]ast fittings are weaker, less reliable, and less expensive." Pl.'s Comments at 7.

See Timken Co. v. United States, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988). Commerce's determination that purchasers of cast and welded pipe fittings have similar expectations because both are expected to prevent corrosion of piping systems is substantially supported by the record.

3. Ultimate Use of the Product

Commerce determined that "the ultimate uses of Eckstrom's cast pipe fittings are the same as those of fittings which the [O]rder is intended to cover." Remand Determination at 10. Commerce's position relies on the order's requirement that pipe fittings subject to the order be "used where one or more of the following conditions is a factor: (1) [c]orrosion of the piping system will occur if material other than stainless steel is used * * *."[9] *Id.* Commerce construes the language "one or more" to mean at least one. *See id.* Eckstrom's cast pipe fittings may be used where corrosion of the piping system will occur if material other than stainless steel is used. *See* Pl.'s Dec. 16, 1998, Questionnaire Response at 12. Thus, Commerce contends, Eckstrom's cast pipe fittings and welded pipe fittings share similar end uses. *See id.*

According to Eckstrom, however, Commerce's analysis is "nonsensical" because it does not address the differences in the specific end uses of cast pipe fittings and welded pipe fittings. *See* Pl.'s Comments at 8–10. Eckstrom argues,

> An almost infinite number of products are suitable for use under any single listed condition, but *only* wrought pipe fittings are suitable for use under *any combination* ("one *or more*") of the requisite conditions * * *. Because cast fittings are not suitable for use under any combination of the listed condisions, cast fittings cannot be within the scope of the [O]rder.

Id. At 9. Eckstrom further contends that Commerce has not indicated that welded pipe fittings are actually used in the same applications as cast pipe fittings. *See id.* In addition, Eckstrom argues that the petitioner's absence from commenting in this scope inquiry indicates that it considers cast fittings to be outside the scope of the Order. *See id.* At 10.

In response, Commerce reiterates its Remand Determination position and counters that there could be many reasons for petitioner's nonparticipation in the remand proceeding. *See* Def.'s Resp. at 15–16.

Commerce's reliance on one of the five listed uses of the product is reasonable. The Order states that the pipe fittings subject to the Order are "used where one *or* more of the following conditions is a factor". Order at 33,250 (emphasis added). The use of the term "or" clearly indicates that the five conditions were listed in the alternative. This Court finds unconvincing Eckstrom's argument that a combination of conditions must be shown for the cast pipe fittings to be covered by the scope. Noth-

[9] The scope description states that subject merchandise is used where one or more of the following conditions is a factor in designing the piping system: 1) corrosion of the piping system will occur if material other than stainless steel is used; 2) contamination of the material in the system by the system itself must be prevented; 3) high temperatures are present; 4) extreme low temperatures are present; and 5) high pressures are contained within the system. *See* Remand Determination at 7.

ing in the Order requires Commerce to demonstrate that cast pipe fittings are used for more than one of the stated purposes. That Plaintiff "can point to evidence * * * which detracts from * * * [Commerce's] decision and can hypothesize a * * * basis for a contrary determination is neither surprising nor persuasive." *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (t) 44, 54, 750 F.2d 927, 936 (1984). In addition, Eckstrom's contention that petitioner's non-participation is indicative of one or the other position is unpersuasive. As Commerce has stated, "there may be many different reasons why the petitioner has not filed comments. *Id.* at 16. Accordingly, this Court holds that Commerce's determination regarding the ultimate use of the product criterion of § 351.225(k)(2) is supported by substantial evidence on the record and otherwise in accordance with law.

4. Channels of Trade

Commerce determined that there is some overlap between Eckstrom's channels of distribution for its cast pipe fittings and welded pipe fittings because Eckstrom sells both products to contractors and to industrial distributors. *See* Remand Determination at 11. Also, Eckstrom sometimes sells both products out of inventory and maintains one sales office for both types of fittings. *See id.* Commerce contends that half of Eckstrom's customers purchase both products, contradicting Eckstrom's claims that there are different markets for each. *See id.* Commerce cites the ITC's determination that, in general, a vast majority of pipe fittings are distributed through distributors, a sales practice similar to Eckstrom's. *See id.* In addition, Eckstrom admits to targeting pulp and paper companies for sales of cast pipe fittings, industries identified by the ITC as primary customers of the stainless steel butt-weld pipe fittings subject to its investigation. *See id.* at 12. Commerce, therefore, concludes that Eckstrom's primary market for sales of cast pipe fittings is similar to the markets for stainless steel butt-weld pipe fittings subject to the Order. On this basis, Commerce determined that both cast and welded pipe fittings have similar channels of trade, and therefore, the cast pipe fittings are covered by the Order. *See id.*

Eckstrom argues that its channels of trade for cast and welded pipe fittings are distinct. *See* Pl.'s Comments at 10. Eckstrom contends it has demonstrated that the two products are sold differently; have different uses; are supplied from different sources; and have different pricing structures. *See id.* According to Eckstrom, just because both products are sold to contractors and industrial distributors does not support the conclusion that they are the same product that is described in an antidumping order. *See id.* at 11. In essence, Eckstrom argues that the channels of trade Commerce looks to here are too broad and that Commerce must be more specific in considering the channels of trade.

Commerce responds that, "[w]hile it is true that similarities in channels of trade would not require a conclusion that the two products are within the scope of an antidumping duty order, such similarities are certainly relevant to Commerce's inquiry." Def.'s Resp. at 17. Commerce

maintains, "[T]hat Eckstrom draws its own conclusions from the evidence does not mean that Commerce's determination is unsupported by substantial evidence." *Id.* at 18.

The regulation does not direct Commerce to be broad or specific in looking at channels of trade, but simply requires Commerce to consider the two products' channels of trade. When a statute is silent or ambiguous, the Court must defer to Commerce's reasonable interpretation. *See Koyo Seiko v. United States,* 36 F.3d 1565, 1573 (Fed. Cir. 1994). Therefore, Commerce has discretion in determining the appropriate channel of trade to be reviewed under the regulation.

Moreover, this court has upheld Commerce's use of a broad channel of trade. For example, in *Diversified Products,* the court sustained Commerce's finding that two products "sold by wholesale distributors in kit form to original equipment manufacturers" had similar channels of trade. 6 CIT at 162, 572 F. Supp. at 889. Although Eckstrom disagrees with Commerce's determination that there is an overlap between the channels of distribution for cast and weld pipe fittings, this does not mean that Commerce's determination was not supported by substantial evidence. *See Consolo,* 383 U.S. at 620 ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Once again, Plaintiff's argument simply invites this Court to re-weigh the record evidence supporting Commerce's determination, which the Court will not do. Thus, this Court finds that Commerce's determination that cast pipe fittings and welded pipe fittings are sold within the same channels of trade is supported by substantial evidence on the record and otherwise in accordance with law.

5. Manner of Advertising or Display

Commerce concludes that Eckstrom treats both its cast and welded pipe fittings similarly in terms of advertising and display because neither are advertised or displayed. *See* Remand Determination at 12. Eckstrom counters that it sells its cast and welded pipe fittings differently. *See* Pl.'s Comments at 11. Eckstrom maintains that it stores cast pipe fittings in inventory while it purchases and sells welded pipe fittings on an as-needed basis only. *See id.* Furthermore, Eckstrom provides inspection and quality control for its cast pipe fittings, but not for its welded pipe fittings. *See id.* at 11–12. Moreover, cast pipe fittings are sold to paper and pulp industries; welded pipe fittings are sold to the semiconductor industry. *See id.* at 12. Eckstrom also argues that the absence of advertising or display practices for both products does not mean that the products are similar. Rather, Eckstrom contends that at most this means that advertising and display practices are irrelevant to the determination of whether the products are similar. *See id.*

With respect to selling practices, Commerce responds that the manner in which the products are sold is irrelevant to the fifth § 351.225(k)(2) criterion because it is not contemplated by the regulation. *See* Def.'s Resp. at 20. The regulation "makes no reference to the manner in which

the merchandise is sold; rather, the regulation directs Commerce to consider the 'manner in which the product is advertised and displayed.'" *Id.* (citing 19 C.F.R. § 351.225(k)(2)(v)). The Court agrees. Criterion 351.225(k)(2)(iv) requires some examination of selling practices; criterion 351.225(k)(2)(v) does not.

Moreover, with respect to advertising and display, this Court finds Eckstrom's argument unpersuasive. Although one may conclude, as Eckstrom does, that the absence of advertising or display practices for two products does not indicate that the two products are advertised and displayed similarly, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620. Commerce has discretion to evaluate the significance of the evidence indicating the absence of advertising or display practices for the two products. The absence of advertising or display practices for Eckstrom's cast and welded pipe fittings reasonably leads to the conclusion that Eckstrom treats both products similarly in terms of advertising and display. Therefore, Commerce's determination that cast and welded pipe fittings are advertised and displayed similarly is supported by substantial evidence.

CONCLUSION

In sum, the Court finds that Commerce's determination with respect to the § 351.225(k)(2) criteria is supported by substantial evidence and otherwise in accordance with law. Therefore, the Court upholds Commerce's conclusion that cast stainless steel butt-weld pipe fittings are of the same class or kind as welded stainless steel butt-weld pipe fittings subject to the Order. Accordingly, this Court sustains Commerce's determination that cast stainless steel butt-weld pipe fittings are subject to the Order.

(Slip Op. 99–100)

SEA-LAND SERVICE, INC. AND AMERICAN PRESIDENT LINES, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 96–02–00398

Plaintiffs, Sea-Land Service, Inc. ("Sea-Land") and American President Lines, Ltd. ("APL"), move, pursuant to USCIT R. 56, for summary judgment on the grounds that the undisputed facts show that, as a matter of law, the United States Customs Service ("Customs") misapplied the decision of *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed Cir. 1994), in assessing duties under 19 U.S.C. § 1466(a) (1994) on plaintiffs' entries of repairs completed on their United States-flagged vessels while abroad. Specifically, plaintiffs claim that Customs: (1) erred in finding that plaintiffs were *per se* liable for duties on vessel repair expenses under 19 U.S.C. § 1466(a) without performing *Texaco's* mandated case-by-case analysis of each expense to determine if such expense would not have been incurred "but for" the dutiable repair work; (2) improperly applied *dicta* in *Texaco* concerning certain vessel repair expenses to similar expenses at issue in this case; (3) failed to properly apply an alleged second prong of *Texaco's* "but for" test by not providing notice in the Federal Register as required under 19 U.S.C. § 1315(d) (1994) when Customs issued rulings changing various established and uniform practices ("EUPs") that previously treated certain vessel repair expenses at issue in this case as nondutiable; and (4) violated 19 U.S.C. § 1625(c) (1994) by issuing protest review decisions modifying or revoking prior Customs interpretive rulings or decisions without giving interested parties notice and opportunity to comment as required under the statute. Plaintiffs also argue that Customs inappropriately applied a *pro rata* duty assessment formula to certain vessel repair expenses that is inconsistent with *Texaco* and 19 U.S.C. § 1466(a). However, since such expenses were not raised in this case, they request that the proration issue be dismissed or severed from this action to allow them to litigate the matter in related actions which more accurately raise the issue. Plaintiffs also request that the Court hold the vessel repair entries as nondutiable and order Customs to reliquidate the protested entries and refund all excess duties plus interest as provided by law.

Defendant opposes plaintiffs' motion and cross-moves, pursuant to USCIT R. 56, for summary judgment, claiming that the entries were properly liquidated as dutiable pursuant to 19 U.S.C. § 1466(a). In particular, defendant asserts that: (1) Customs conducted a case-by-case, rather than *per se*, "but for" analysis for each vessel repair expense at issue; (2) Customs properly applied the "but for" test, rather than *dicta*, as enunciated by *Texaco* to such expenses; (3) *Texaco* did not establish a second prong test requiring Customs to find that no EUPs exist under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related expenses; (4) the provisions of 19 U.S.C. § 1625(c) are inapplicable in this case; and (5) this Court lacks jurisdiction to address plaintiffs' proration matter and, therefore, summary judgment is improper on this issue.

Held: Plaintiffs' motion for summary judgment is denied and defendant's cross-motion is granted. This action is dismissed.

[Plaintiffs' summary judgment motion denied; defendant's cross-motion granted. Case dismissed.]

(Dated September 23, 1999)

Arter & Hadden LLP (Myles J. Ambrose and *Evelyn M. Suarez);* of counsel: *Robert S. Zuckerman*, for plaintiff Sea-Land Service, Inc.

Garvey, Schubert & Barer (E. Charles Routh and *Carol L. Saboda)* for plaintiff American President Lines, Ltd.

David W. Odgen, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara S. Williams);* of counsel: *Karen P. Binder*, Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

Collier, Shannon, Rill & Scott, PLLC (Lauren R. Howard) for Shipbuilders Council of America, Inc., *amicus curiae* in support of defendant's cross-motion for summary judgment.

OPINION

TSOUCALAS, *Senior Judge:* This matter is before the Court on cross-motions for summary judgment pursuant to USCIT R. 56. In their motion for summary judgment, plaintiffs, Sea-Land Service, Inc. ("Sea-Land") and American President Lines, Ltd. ("APL"), seek to recover duties assessed by the United States Customs Service ("Customs") under 19 U.S.C. § 1466(a) (1994) on plaintiffs' entries of repairs completed on their United States flagged-vessels while abroad. Plaintiffs request that the Court hold the vessel repair entries as nondutiable and order Customs to reliquidate the protested entries and refund all excess duties plus interest as provided by law. Defendant counters that the entries were properly liquidated as dutiable pursuant to 19 U.S.C. § 1466(a). For the reasons set forth in the opinion which follows, the Court grants defendant's cross-motion for summary judgment and denies plaintiffs' motion. The action is dismissed.

BACKGROUND

I. *Texaco's* "But For" Test

This case involves Customs' application of *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed. Cir. 1994). In *Texaco*, the United States Court of Appeals for the Federal Circuit ("CAFC") affirmed this Court's holding that post-repair cleaning and protective covering expenses related to repairs performed on a United States-flagged vessel by foreign labor while abroad, were properly dutiable as "expenses of repairs" pursuant to the vessel repair statute, 19 U.S.C. § 1466(a),[1] because the expenses were an integral part of the repair process and would not have been necessary "but for" the dutiable repairs. *See Texaco*, 44 F.3d at 1543–50.

The CAFC in *Texaco* also provided clear guidance for interpreting the phrase "expenses of repairs" in 19 U.S.C. § 1466(a). *See id.* at 1543–45. The CAFC found that "the language 'expenses of repairs' is broad and unqualified." *Id.* at 1544. In particular, the CAFC interpreted "'expenses of repairs' as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, 'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work." *Id.* To interpret the statute any more restrictively would, according to the CAFC, thwart Congress' intent to make the statute's

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[1] Title 19, United States Code, § 1466(a) provides in pertinent part:

(a) Vessels subject to duty; penalties

The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (1994).

application broad in scope. *See id.* Indeed, the CAFC noted that such a "but for" interpretation effectuates the statute's clear purpose of protecting United States shipbuilding and repair industry. *See id.* at 1544–45.

The CAFC further found that to the extent that non-binding judicial authority relied upon by plaintiffs in *Texaco* was inconsistent with the court's "but for" interpretation, it was "not persuaded * * * to interpret 'expenses of repairs' any more restrictively than the plain language of the statute warrants." *Id.* at 1546. Specifically, the CAFC addressed three cases: (1) *American Viking Corp. v. United States*, 37 Cust. Ct. 237, 245, C.D. 1830, 150 F. Supp. 746, 752 (1956) (holding that expense of providing lighting needed to perform a dutiable repair was not dutiable as an expense of the repair); (2) *International Navigation Co. v. United States*, 38 Cust. Ct. 5, 12, C.D. 1836, 148 F. Supp. 448, 455 (1957) (holding that expenses to transport a foreign repair crew to and from an anchored vessel being repaired, which expenses the court specifically found were necessary to perform the work, were not dutiable as expenses of repairs); and (3) *Mount Washington Tanker Co. v. United States*, 1 CIT 32, 42, 505 F. Supp. 209, 216 (1980) (holding that expenses for compensating foreign repair crew members for their time spent traveling between their home country and a vessel anchored at sea off another foreign port were not dutiable as an expense of the dutiable repairs performed by the repair crew). *See id.* at 1546–47. The CAFC determined that the vessel repair-related expenses at issue in these three cases would also have been viewed as coming within 19 U.S.C. § 1466(a) if a "but for" approach was applied. *See id.* The CAFC, therefore, concluded that these cases were "incorrectly decided." *Id.* at 1547.

Finally, the CAFC rejected plaintiffs' claim in *Texaco* that Customs' assessment of duties on the cleaning and protective covering expenses was improper because it was based on an interpretation of "expenses of repairs" that was a change in established and uniform practice ("EUP"), as provided by a Treasury decision, and that Customs made the change without giving notice in the Federal Register as required under 19 U.S.C. § 1315(d) (1994). *See id.* at 1547–48. In particular, plaintiffs asserted that Treasury Decision ("T.D.") 39443, 43 Treas. Dec. 99 (1923), established an interpretation for "expenses of repairs" which was inconsistent with Customs' assessment of duties in the *Texaco* case. *See Texaco*, 44 F.3d at 1547. Plaintiffs claimed that T.D. 39443 interpreted "expenses of repairs" under 19 U.S.C. § 1466(a) "as covering only those expenses incurred for work directly involved in the actual making of repairs" and that, therefore, under this standard, cleaning and protective covering expenses were "not 'expenses of repairs' within the meaning of the statute." *Id.* The CAFC disagreed that T.D. 39443 established a narrow standard for "expenses of repairs" and, in fact, the court concluded that it provided nothing with respect to the interpretation of "expenses of repairs." *See id.* at 1548.

After finding this Court properly adopted a "but for" standard for "expenses of repairs," the CAFC concluded that the expenses at issue in *Texaco* were properly assessed with the vessel repair duty under 19 U.S.C. § 1466(a).

II. Customs' Application of *Texaco*

A. HQ Memorandum 113308

Recognizing that the CAFC's decision in *Texaco* was not only dispositive for the expenses at issue in the case, but also instructive as to Customs' administration of the vessel repair statute with respect to the interpretation of the term "expenses of repairs" contained therein, the Assistant Commissioner for Customs Office of Regulations and Rulings ("OR&R") issued Headquarters ("HQ") memorandum 113308 to Customs Regional Director, Commercial Operations Division, New Orleans, dated January 18, 1995, and subsequently published it in the *Customs Bulletin and Decisions*. *See* 29 *Cust. B. & Dec.* 59 (Feb. 8, 1995). In that memorandum, copies of which were disseminated to two other field offices charged with the liquidation of vessel repair entries, Customs stated that pursuant to *Texaco*, foreign repair expenses previously considered nondutiable would possibly "constitute dutiable 'expenses of repairs' under the 'but for' test." *Id.* at 60. The memorandum instructed that any foreign repair costs contained in the vessel repair entries not finally liquidated as of the date of the CAFC's *Texaco* decision (that is, Dec. 29, 1994), should be liquidated as dutiable "expenses of repairs" provided they pass *Texaco's* "but for" test. *See id.*

B. HQ Memorandum 113350

In response to the HQ memorandum 113308, plaintiffs and other American vessel owners/operators requested a meeting with Customs to discuss Customs' implementation of *Texaco's* "but for" test. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at Ex. 3. On February 22, 1995, representatives of Sea-Land and APL met with the Assistant Commissioner of OR&R and other Customs staff and urged Customs to rescind HQ memorandum 113308, but Customs refused to retract it. *See id.*

Nevertheless, upon further review of the matter, the Assistant Commissioner of OR&R again issued a HQ memorandum, denominated 113350, to the Regional Director, Commercial Operations Division, New Orleans, dated March 3, 1995, and subsequently published in the *Customs Bulletin and Decisions*, which clarified the effective date of HQ memorandum 113308. *See* 29 *Cust. B. & Dec.* 24 (Apr. 5, 1995).[2] The HQ memorandum 113350 provided that instead of assessing duties on vessel repair entries unliquidated at the time of CAFC's *Texaco* decision, Customs would limit its assessment to entries filed on or after the date of that decision. *See id.* at 25. With respect to the vessel repair entries filed prior to the *Texaco* decision, Customs would retroactively apply *Texa-*

[2] Customs also published the text of the *Texaco* decision in the *Customs Bulletin and Decisions*. *See* 29 *Cust. B. & Dec.* 19 (Mar. 8, 1995).

co's "but for" test only to the post-repair cleaning and protective covering expenses that were directly decided by the CAFC in that case. *See id.*

C. Assessment of Duties

From January 1995 through March 1996, Sea-Land and APL declared and entered with Customs the vessel repair expenses that are at issue here as required under 19 C.F.R. § 4.14(b) (1995 & 1996).[3] The vessel repair entries involved expenses for work performed abroad on several United States-flagged vessels by foreign labor. The entries included expenses such as transportation, travel, equipment rental, meal, administrative, insurance and tax costs. None of the entries concerned dry-docking expenses. Customs examined every entry to determine whether each expense was incurred "but for" dutiable repairs. For those expenses which Customs found satisfied the "but for" test, Customs liquidated the entries and assessed duties pursuant to 19 U.S.C. § 1466(a); where Customs found that the expenses did not pass the "but for" test, no duties were imposed.

III. Procedural History

After all the liquidated duties on the applicable vessel repair entries were paid as required by 28 U.S.C. § 2637(a) (1994), Sea-Land and APL filed administrative protests for the liquidations. In due course, Customs denied the protests, whereupon Sea-Land and APL subsequently filed separate actions before this Court. These actions were consolidated on May 20, 1997. The consolidated action was designated as a test case for all further entries pursuant to USCIT R. 84(c). On July 7, 1998, Sea-Land and APL jointly moved for summary judgment to recover any and all excess duties together with interest assessed by Customs on the protested vessel repair entries under 19 U.S.C. § 1466(a). Defendant cross-moved for summary judgment on December 7, 1998, maintaining that Customs properly assessed such duties. On December 17, 1998, this Court allowed Shipbuilders Council of America, Inc., a national non-profit trade association representing United States shipyards engaged in the construction and repair of ocean-going vessels, to participate as *amicus curiae* in support of the defendant's position. Oral argument was heard on June 29, 1999.

DISCUSSION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994).

I. Standard of Review

"On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United*

[3] A vessel owner (or master) is required, upon first arrival of the vessel in the United States, to declare to Customs all repairs made outside of the United States, regardless of the dutiable status of the expenses for repairs. *See* 19 C.F.R. § 4.14(b)(1) (1995 & 1996). The vessel owner (or master) also must file entry of repairs with Customs. *See id.* § 4.14(b)(2).

States, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988) (citations omitted). In ruling on cross-motions for summary judgment, if no genuine issue of material fact exists, the court must determine whether either party "is entitled to a judgment as a matter of law." USCIT R. 56(d); *see Skaraborg Invest USA, Inc. v. United States*, 22 CIT ____, ____, 9 F. Supp. 2d 706, 708 (1998); *Phone-Mate*, 12 CIT at 577, 690 F. Supp. at 1050. This is the same standard set forth in Fed. R. Civ. P. 56(c). *See Texaco*, 44 F.3d at 1543.

In this case, the movants stipulated to the following facts: (1) Customs issued certain HQ rulings, as enumerated in the pleadings, that have not been revoked, rescinded, amended or noted as a change of practice or position pursuant to 19 U.S.C. § 1625(a) and 19 C.F.R. § 177.10(c); (2) such HQ rulings relate to the dutiability of one or more items of the plaintiffs' protests; (3) none of the protests relates to duty assessed under 19 U.S.C. § 1466(a) for cleaning or covering expenses; and (4) some of the protests relate to duty assessed to certain items on a *pro rata* basis apportioned by Customs to reflect what Customs alleges are the dutiable and nondutiable foreign costs of an entry. *See* Stip. Facts at ¶ 1–5 (Aug. 21, 1997). The movants agree, and the Court finds, that there are no genuine material issues of fact in dispute and this action may be decided on motion for summary judgment.

II. Customs' Alleged Per Se Application of *Texaco's* "But For" Test

Plaintiffs argue that Customs violated the doctrine of *stare decisis* because, contrary to *Texaco*, it had taken the position that plaintiffs were *per se* liable for the 50-percent *ad valorem* duty on various vessel repair expenses under 19 U.S.C. § 1466(a) without performing a case-by-case "but for" analysis for each expense. *See* Pls.' Mem. Supp. Mot. Summ. J. at 7. Specifically, plaintiffs note that *Texaco* held that only post-repair cleaning and protective covering expenses are dutiable as "expenses of repairs" under 19 U.S.C. § 1466(a). *See id.* at 10. Since none of the protests in this case involved cleaning or covering expenses, *see* Stip. Facts at ¶ 4, plaintiffs assert that *Texaco* requires Customs to apply a "two-prong" test on a case-by-case, rather than a *per se*, basis to determine whether a particular expense is dutiable as an expense of repair, *see* Pls.' Mem. Supp. Mot. Summ. J. at 10–15.

Defendant counters that Customs individually applied the "but for" test to each and every vessel repair-related expense at issue, rather than on a *per se* basis and correctly determined that each of plaintiffs' dutiable expenses were incurred "but for" dutiable vessel repairs. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 9–18.

The Court agrees with the defendant that Customs properly conducted a case-by-case "but for" analysis for each expense at issue. Customs' HQ memoranda 113308 and 113350 lend support to such a conclusion. Rather than directing its field offices to automatically assess the 50-percent *ad valorem* duty on every vessel repair entry, HQ memorandum 113308 instructed that "any * * * costs contained in vessel repair entries * * * should be liquidated as dutiable as 'expenses of repairs'

provided they pass the 'but for' test." 29 *Cust. B. & Dec.* 59, 60 (Feb. 8, 1995) (emphasis in original). Likewise, HQ memorandum 113350 noted that "a myriad of foreign repair expenses previously accorded duty-free treatment would, under certain circumstances, no longer receive such treatment." 29 *Cust. B. & Dec.* 24 (Apr. 5, 1995). Indeed, a review of the entries in these consolidated actions establish that Customs not only instructed its field offices to perform a case-by-case "but for" analysis of each expense, but Customs also actually performed this analysis. Various entries show that Customs found some expenses were dutiable, while other expenses, even within the same entry, were determined to be nondutiable.

III. Customs' Alleged Application of *Texaco Dicta*

Plaintiffs assert that the CAFC's statements in *Texaco* concerning lighting, transportation and travel expenses were *dicta* without any *stare decisis* effect because such expenses were not directly before the CAFC in that case. *See* Pls.' Mem. Supp. Mot. Summ. J. at 10–11. In particular, plaintiffs note that these expenses were mentioned in previous cases (that is, *American Viking* (lighting expenses), *International Navigation* (repair crew transportation expenses) and *Mount Washington* (travel time compensation expenses)) used by the CAFC to further demonstrate the validity of the "but for" test. *See id.* at 11. Plaintiffs note that Customs' position in this case that *Texaco* constitutes *stare decisis* for resolving expenses, which do not concern clean up or protective covering expenses directly involved in *Texaco*, is untenable because it goes beyond well-established rules which mandate applying the *stare decisis* doctrine only to those cases with similar fact patterns. *See id.* Plaintiffs, therefore, argue that Customs improperly acted by applying such *dicta* to similar expenses at issue in this case. *See id.*

Defendant argues that the CAFC's determination in *Texaco* finding that lighting, transportation and travel expenses are dutiable is *stare decisis*, rather than *dicta*, because the determination was essential to the court's finding that the phrase "expenses of repairs" under 19 U.S.C. § 1466(a) implicates the "but for" standard. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 17. In the alternative, defendant asserts that *Texaco's* "but for" test is still binding precedent here and must be applied to all expenses to determine those that are dutiable. *See id.* at 17–18. In particular, defendant claims that the CAFC's analysis in *Texaco* of the vessel repair statute so as to require the application of the "but for" test to each expense was an issue of law and, therefore, is binding law in this case. *See id.*

The Court rejects plaintiffs' argument that Customs acted improperly by applying alleged *dicta* from *Texaco*. Even if the CAFC's determinations in *Texaco* on such expenses "might" technically qualify as *dicta* and, therefore, might not be binding in a subsequent proceeding such as this one, *see generally King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996) (defining *dicta* as "[w]ords of an opinion entirely unnecessary for the decision of the case") (citations omitted), *rev'd sub nom. on other*

grounds, 522 U.S. 262 (1998), the Court nevertheless finds that Customs acted properly. Under principles of *stare decisis*, Customs was still bound to apply *Texaco's* mandate of assessing the vessel repair duty on any and all repair expenses in this case meeting the "but for" test, including, but not limited to, lighting, transportation and travel expenses.

IV. *Texaco*'s Alleged Two-Prong Test

A. Applicability of 19 U.S.C. § 1315(d)

Plaintiffs maintain that *Texaco* established a "two-prong" test for determining dutiability of vessel repair expenses under 19 U.S.C. § 1466(a). *See* Pls.' Mem. Supp. Mot. Summ. J. at 10–15. Under the first prong, plaintiffs assert that Customs must determine whether a particular expense met the "but for" standard, that is, whether the expense would not have been necessary "but for" dutiable vessel repairs. *See id.* at 12. Even if the expense is found to be dutiable under this standard, plaintiffs contend that the second prong requires that Customs also find that assessing duties on the particular expense at issue does not run counter to an EUP of nondutiability of that expense. *See id.* at 14. If the expense is contrary to such an EUP, plaintiffs assert that Customs must first comply, under *Texaco*, with the notice requirement of 19 U.S.C. § 1315(d), and now the notice-and-comment requirements of 19 U.S.C. § 1625(c) (1994), before ruling that the expense is dutiable. *See id.* Plaintiffs assert that Customs failed: (1) to properly apply *Texaco's* two-prong test; and (2) to comply with the statutory notice-and-comment requirements before assessing duties to expenses at issue in this case. *See id.* at 11–15.

With respect to the second prong, plaintiffs first suggest that Customs' protest review decisions, not the CAFC's *Texaco* decision, changed various EUPs that found certain vessel repair expenses at issue in this case as nondutiable. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 6–11. These protest review decisions, according to plaintiffs, triggered the notice requirement of § 1315(d),[4] which Customs neglected to comply with here. *See id.* Plaintiffs claim that the change in EUPs were acknowledged by Customs in HQ memorandum 113308 for it provided a "finding" of various EUPs by the Secretary of the Treasury under 19 U.S.C. § 1315(d).[5] *See id.* at 6–7. Even absent such a formal finding, plaintiffs claim that *de facto* EUPs existed because (1) hundreds of HQ rulings, which plaintiffs identified in their complaints as being revoked by Customs and to which Customs stipulated in issuing such rulings,

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[4] Title 19, United States Code, § 1315(d) provides in pertinent part:

(d) Effective date of administrative rulings resulting in higher rates

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling.

19 U.S.C. § 1315(d) (1994).

[5] HQ memorandum 113308 stated in pertinent part:

It is readily apparent that this case has wide-ranging ramifications with respect to Customs liquidation of vessel repair entries. For example, as you well know we currently do not consider the following foreign costs dutiable under the vessel repair statute: air, crane, drydocking charges, electricity, travel/transportation, launch use, lodging, security and staging. * * * [T]his list of costs is not all inclusive.

29 *Cust. B. & Dec.* 59, 59–60 (Feb. 8, 1995).

clearly established a series of EUPs; and (2) the language of HQ memoranda 113308 and 113350 clearly provided that Customs had EUPs of not considering the expenses at issue as dutiable. *See id.* at 3–10.

Plaintiffs further argue that even if this Court were to find that they had not carried their burden of proof of showing *de facto* EUPs at this stage of the proceedings, this does not mean that Customs is entitled to summary judgment; rather, they contend this simply raises an issue of proof which would have to be resolved at a trial. *See id.* at 9. Plaintiffs also maintain that the alleged protest review decisions applied the "but for" test to determine whether a particular expense was a dutiable expense of repair without taking the second step under *Texaco* of analyzing whether EUPs existed for the various expenses. *See id.* at 9–10.

Defendant argues that *Texaco* did not establish a second prong test requiring Customs to find that no EUP exists under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related expenses. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 19. Moreover, defendant asserts that 19 U.S.C. § 1315(d)'s requisite notice in the Federal Register was not violated here. *See id.* at 18. Specifically, defendant claims that there was no "administrative ruling" resulting in the imposition of a higher rate of duty on "imported merchandise"[6] under an EUP because HQ memoranda 113308 and 113350, Customs' protest denials or any of plaintiffs' unnamed and unidentified protest review decisions did not result in the assessment of higher duties. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 7–8. Rather, defendant contends that the CAFC's decision in *Texaco* mandated the change. *See id.* at 8.

In the alternative, defendant argues that even if one assumes that an "administrative ruling" resulted in the assessment of higher duties on plaintiffs' entries, 19 U.S.C. § 1315(d) is still inapplicable because plaintiffs did not meet their burden of proving either (1) the Secretary of the Treasury made a formal "finding" of an EUP as required by the statute; or (2) if no finding was made by the Secretary, that a *de facto* EUP existed. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 22–28. Even if plaintiffs show that a *de facto* EUP existed, defendant claims that the plaintiffs had actual notice of the change in practice before the entries were made in this action because (1) plaintiffs were members of The American Institute for Merchant Shipping, who participated as *amicus curiae* in *Texaco*; (2) Customs had issued and published HQ memoranda 113308 and 113350; and (3) plaintiffs met with Customs on February 22, 1995. *See id.* at 28–32.

1. *Texaco*'s One-Prong "But For" Test

The Court rejects plaintiffs argument that *Texaco* contained a second prong requiring Customs to affirmatively prove no EUP exists under 19 U.S.C. § 1315(d) before it can impose duties on vessel repair-related ex-

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[6] With respect to "imported merchandise," the CAFC clarified that "19 U.S.C. § 1498(a)(10) * * * indicates an intention by Congress that expenses within the vessel repair statute shall be regarded as merchandise imported into the United States." *Texaco*, 44 F.3d at 1547 (citations omitted).

penses found dutiable under the "but for" test.[7] Although plaintiffs note that in *Texaco* the CAFC stated "we hold that the imposition of the fifty percent *ad valorem* duty upon the expenses at issue in this case was consistent with the vessel repair statute and not contrary to any established and uniform practice of Customs," this Court finds that the CAFC's statement does not establish a two-prong test for determining the dutiability of a vessel repair expense under 19 U.S.C. § 1466(a). *Texaco*, 44 F.3d at 1543.

In *Texaco*, the CAFC agreed with this Court's "but for" interpretation of "expenses of repairs" under 19 U.S.C. § 1466(a) that duties can be assessed against vessel repair expenses incurred "but for" dutiable repair work. *See id.* at 1543–45. Only after reaching this finding, the CAFC considered and rejected the plaintiffs' claim in *Texaco* that Customs should not have assessed duties on the expenses at issue in the case because Customs' assessment changed an EUP without providing the requisite notice in the Federal Register under 19 U.S.C. § 1315(d). *See id.* at 1547–48. In responding to plaintiffs' argument, the CAFC affirmed that an EUP claim is available to a party in a case involving the imposition of a higher rate of duty to imported merchandise, including duties on vessel repair expenses. *See id.*

Nevertheless, the CAFC in *Texaco* did not change the fact that the burden rests upon the plaintiff to prove that an EUP exists under 19 U.S.C. § 1315(d), a burden the CAFC determined the plaintiffs did not meet in the case.[8] *See, e.g.*, *Siemens America, Inc. v. United States*, 692 F.2d 1382, 1384 (Fed. Cir. 1982) (noting that, even if a "finding" of an EUP by the Secretary of the Treasury is not a prerequisite to application of 19 U.S.C. § 1315(d), the importers still shoulder "their burden of proving that there existed an established and uniform practice"). In other words, the CAFC did not create a second prong requiring Customs to affirmatively prove that an EUP does not exist before it can impose duties on expenses that meet the "but for" test; rather, the CAFC merely addressed the plaintiffs' failure to satisfy their burden of demonstrating an EUP under 19 U.S.C. § 1315(d). The Court, therefore, finds that *Texaco* only established a one-prong "but for" test for determining whether a vessel repair expense under 19 U.S.C. § 1466(a) is dutiable.

2. Lack of "Administrative Ruling" Under 19 U.S.C. § 1315(d)

The Court further finds that the thirty-day notice in the Federal Register under 19 U.S.C. § 1315(d) is inapplicable in this case because plaintiffs failed to demonstrate that the elements of the statute were violated. To trigger this procedural requirement, there must have been (1) an administrative ruling that increases the rate of duty on the imported merchandise; and (2) the merchandise is subject to an EUP of a lower duty rate. *See* 19 U.S.C. § 1315(d).

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[7] Plaintiffs do not challenge Customs' use of the "but for" test to determine whether a particular entry of repair is dutiable as an expense of repair under 19 U.S.C. § 1466(a). *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 3.

[8] Indeed, plaintiffs appear to acknowledge this burden, asserting in their reply brief that they "met their burden to establish the existence of EUP's." Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 6.

In this action, an "administrative ruling" did not result in the imposition of a higher rate of duty. In other words, despite plaintiffs' contentions, the protest review decisions or protest denials did not provide a new interpretation of the vessel repair statute that resulted in the assessment of higher duties. Rather, the CAFC's decision in *Texaco* mandated the change that led to higher duties.

As noted, the CAFC enunciated in *Texaco* that the "expenses of repairs" language in 19 U.S.C. § 1466(a) covers expenses which were incurred "but for" dutiable repairs. *See Texaco*, 44 F.3d at 1543–45. The CAFC's determination is a matter of law that must be followed by this Court and Customs. *See United States v. Ben Felsenthal & Co.*, 16 Ct. Cust. Appl. 15, 17–18 (1928) (holding that it is "well settled that where a court of competent jurisdiction settles and judicially defines the common meaning of a term used in a statute, such a determination and adjudication becomes [a] matter of law" and will be adhered to until a legislative change in statute necessitates a change in meaning). Where a judicial decision mandates a change in an EUP, 19 U.S.C. § 1315(d) is inapplicable. *See Westergaard, Berg-Johnsen Co. v. United States*, 17 Cust. Ct. 1, 3, C.D. 1009 (1946) (noting that 19 U.S.C. § 1315(d) is limited to an administrative ruling changing an EUP of a lower duty rate, but does not apply where the higher assessment is due to a judicial decision). Moreover, the legislative history of 19 U.S.C. § 1315(d) expressly removes judicial decisions from the notice requirement of 19 U.S.C. § 1315(d). *See id.* Accordingly, since Customs' actions following *Texaco*, including the issuance of HQ memoranda 113308 and 113350 implementing the "but for" test and subsequent protest denials, were based on the agency complying with a judicial mandate, the Court finds that 19 U.S.C. § 1315(d) does not apply in this case on this basis alone. The Court, therefore, declines to address plaintiffs' EUP arguments under 19 U.S.C. § 1315(d).

B. Applicability of 19 U.S.C. § 1625(c)(1)

As part of their argument pertaining to their alleged second-prong of *Texaco's* "but for" test, plaintiffs also claim that Customs violated 19 U.S.C. § 1625(c) by issuing numerous protest review decisions that modified or revoked prior Customs interpretive rulings or decisions without giving interested parties notice and opportunity to comment beforehand as required under the statute.[9] *See* Pls.' Mem. Supp. Mot. Summ.

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[9] Title 19, United States Code, § 1625(c) provides in pertinent part:

> **(c) Modification and revocation**
> A proposed interpretive ruling or decision which would—
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625(c) (1994). Section 1625, as amended by § 623 of Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (Dec. 8, 1993), was not in effect at the time Customs considered the vessel repair entries in *Texaco* and, therefore, it was not part of the case's holding.

J. at 15–18. In particular, plaintiffs point out that these protest review decisions (1) modified or revoked Customs HQ rulings or decisions that had been in effect for years, in violation of 19 U.S.C. § 1625(c)(1); and (2) had the effect of modifying the nondutiable treatment Customs previously accorded to various vessel repair expense entries, in violation of 19 U.S.C. § 1625(c)(2). *See id.* at 17. Moreover, even if Customs' HQ memoranda 113308 and 113350 and the February 1995 meeting between Customs and plaintiffs can be construed as giving notice and opportunity to comment, plaintiffs assert that under *American Bayridge Corp. v. United States*, 22 CIT ___, 35 F. Supp. 2d 922 (1998), the notice-and-comment requirements of 19 U.S.C. § 1625(c) are mandatory rather than discretionary and, thus, Customs violated the statute by failing to comply with such requirements. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 12–14.

Defendant argues that the provisions of 19 U.S.C. § 1625(c) are inapplicable here. *See* Def.'s Mem. Supp. Cross-mot. Summ. J. at 32–39. In particular, defendant claims that the alleged interpretive rulings or protest review decisions, which were unnamed and unidentified by plaintiffs, did not "modify" prior Customs rulings, decisions or treatment of vessel repair expenses; rather, the CAFC's mandate in *Texaco* did so, which Customs is bound to follow. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 16. Indeed, defendant notes that if the alleged protest review decisions were considered to have modified prior rulings or decisions, Customs could not follow *Texaco* without first publishing notice and giving interested parties the opportunity to comment on whether *Texaco* was correct—an irrelevant question since Customs has no option but to observe *Texaco's* mandate. *See id.* at 16–17.

In addition, defendant asserts that plaintiffs did not meet the specific requirements of 19 U.S.C. § 1625(c)(1) in that plaintiffs failed to identify a single protest review decision that explicitly "revoke[d] a prior interpretive ruling or decision which has been in effect for at least 60 days." *Id.* at 17 (quoting 19 U.S.C. § 1625(c)(1)). Similarly, defendant claims that plaintiffs failed to identify any evidence demonstrating that the alleged protest review decisions under 19 U.S.C. § 1625(c)(2) had the effect of "modifying the treatment previously accorded by the Customs Service to substantially identical transactions" or that Customs ever issued such a "modifying" ruling. *Id.* at 18 (quoting 19 U.S.C. § 1625(c)(2)). Defendant also argues that the facts at issue here are distinguishable from *American Bayridge* and, therefore, plaintiffs erred in relying on the case. *See id.* at 19–20.

The Court rejects plaintiffs' contention that 19 U.S.C. § 1625(c) applies in this case. First, 19 U.S.C. § 1625(c) requires the Secretary of the Treasury to publish a proposed interpretive ruling or decision in the *Customs Bulletin* and to give interested parties an opportunity to comment if such a ruling or decision would: (1) modify or revoke a prior interpretative ruling or decision that had been in effect for at least 60 days; or (2) have the effect of modifying Customs' previous treatment of sub-

stantially identical transactions. *See* 19 U.S.C. § 1625(c)(1), (2). In this case, however, Customs did not issue a proposed interpretive ruling or decision within the meaning of 19 U.S.C. § 1625(c). In other words, Customs did not, on its own motion, undertake review of the dutiability of foreign repairs and propose a new interpretation of customs law; rather, the CAFC's decision in *Texaco* established a new interpretation of law that Customs is bound to follow. The Court, therefore, concludes the protest review decisions alluded to by plaintiffs, as well as the HQ memoranda 113308 and 113350 published in the *Customs Bulletin*, were not proposed interpretive rulings or decisions; instead, such decisions and memoranda merely implemented the judicial mandate of *Texaco*.

Similarly, the Court finds that plaintiffs failed to show how the protest review decisions and the HQ memoranda modified or revoked prior interpretative rulings or decisions or modified the treatment previously accorded to substantially identical transactions. No prior interpretative rulings or decisions, for instance, were expressly discussed in either HQ memoranda.

The Court also finds that plaintiffs' insistence on a notice-and-comment period under 19 U.S.C. § 1625(c) in the instant case would serve no purpose. Section 1625(c)'s stated goal is to allow interested parties to comment on "the correctness of the proposed ruling or decision." 19 U.S.C. § 1625(c). Here, Customs did not issue a proposed ruling or decision. Further, Customs did not have any discretion with regard to the CAFC's decision in *Texaco* because Customs could not modify or reject the judicial decision. The Court, therefore, finds that requiring comments on the "correctness" of a judicial decision would be inappropriate.

As further support that 19 U.S.C. § 1625(c) excludes judicial decisions, the Court finds guidance in subsection (d) of the statute. Section 1625(d) addresses the circumstance in which Customs needs to provide a comment period with regard to a court decision. Specifically, subsection (d) provides that "[a] decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision." 19 U.S.C. § 1625(d). Subsection (d), therefore, makes clear that Customs is only required to hold a comment period with regard to a judicial opinion if Customs seeks to limit its applicability. Where, as here, Customs plans to fully implement a judicial mandate, no solicitation of public comment is necessary.

The Court also disagrees with plaintiffs' assertion that Customs violated 19 U.S.C. § 1625(c) under the holding of *American Bayridge*. While *American Bayridge* stands for the proposition that Customs must honor the procedural requirements of 19 U.S.C. § 1625(c), the Court finds this case does not expand the scope of the statute to encompass the case at bar. In *American Bayridge*, Customs decided, on its own motion, to reinterpret the coverage of certain tariff classifications, *see* 35 F. Supp. 2d at 923–24; in this action, however, Customs merely applied a judicial deci-

sion to the vessel repair entries before it. Further, in *American Bayridge*, Customs expressly revoked an identified ruling, *see id.* at 924; whereas here, Customs' HQ memoranda and the protest review decisions took no such action. The fact that *American Bayridge* held that 19 U.S.C. § 1625(c) is mandatory does not make it applicable to cases that fall outside of its purview such as this action. Accordingly, the Court concludes that plaintiffs' reliance on *American Bayridge* is inappropriate.

V. Customs' Alleged *Pro-Rata* Duty Assessment of Certain Vessel Repair Expenses

Plaintiffs initially noted in their brief that an expense under *Texaco's* "but for" test is either an expense of repair or it is not, that is, the repair cannot be both dutiable and nondutiable. *See* Pls.' Mem. Supp. Mot. Summ. J. at 20. Thus, plaintiffs argued in their brief that Customs erred under *Texaco* and 19 U.S.C. § 1466(a) in assessing duties on a *pro-rata* basis to certain vessel repair entries in this case if Customs found any dutiable reason for the expense of the repair work. *See id.* at 18–21. Nevertheless, in their reply brief, plaintiffs assert that while they have identified an entry that was prorated, they acknowledge this entry does not concern a *pro-rata* duty that conflicts with *Texaco*. *See* Pls.' Reply Opp'n to Def.'s Cross-mot. Summ. J. at 2–3, 14. Plaintiffs, therefore, contend that their proration issue should be dismissed or severed from this action to allow them to litigate the issue in related actions which more accurately raise the issue. *See id.*

Defendant asserts that plaintiffs' proration issue should not be dismissed or severed because the issue was never raised in this action. *See* Def.'s Mem. Reply to Pls.' Opp'n to Def.'s Cross-mot. Summ. J. at 4 n.4. Moreover, defendant claims that since the issue of proration based on a misapplication of *Texaco's* "but for" test was never raised by plaintiffs in any of their entries or the complaints in this action, the Court does not have jurisdiction over the issue and, therefore, summary judgment on this matter is improper and must be denied. *See id.*

Contrary to defendant's assertion of lack of jurisdiction, the Court finds that, in general, plaintiffs raised the proration issue in this action because APL's complaint and the parties' stipulation of facts alluded to the issue.[10] Nevertheless, the Court agrees with both parties that the issue of proration based on a misapplication of *Texaco's* "but for" test was not specifically discussed in this action. Accordingly, the Court declines to address the issue and, therefore, summary judgment on the issue is denied.

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[10] *See* APL Compl. at ¶ 8 (stating that "Customs has improperly applied and impermissibly expanded the Court's ruling in *Texaco* * * * in that * * * they have apportioned duty when the 'but for' test in Texaco has been met"); Stip. Facts at ¶ 5 ("Some of the protests which are the subject of the complaints consolidated in this action relate to duty assessed to certain items on a pro rata basis apportioned by Customs to reflect what Customs alleges are the dutiable and non-dutiable foreign costs in this entry.").

CONCLUSION

For the foregoing reasons, the Court grants defendant's cross-motion for summary judgment and denies plaintiffs' motion. The action is dismissed. Judgment will be entered accordingly.

(Slip Op. 99–101)

LUXURY INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, RAYMOND KELLY, COMMISSIONER OF CUSTOMS, IRENE JANKOV, PORT DIRECTOR, LOS ANGELES CUSTOMS DISTRICT, AND UNITED STATES CUSTOMS SERVICE, DEFENDANTS

Court No. 99–02–00093

Plaintiff, Luxury International, Inc. ("Luxury"), seeks declaratory and mandamus relief to compel the United States Customs Service ("Customs") to release goods that allegedly infringe on a copyright and to turn over security posted by the copyright owner pursuant to 19 C.F.R. § 133.43 (1998). The copyright owner, ZAO "Elorg," and its exclusive licensee, The Tetris Company, LLC, ("Tetris Co.") (collectively "ZAO"), seek to intervene in the present action pursuant to USCIT R. 24. ZAO also moves to dismiss for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1) and for failure to state a claim pursuant to USCIT R. 12(b)(5). Luxury moves to supplement its opposition to ZAO's motion for intervention.

Held: Luxury's motion to supplement is denied. ZAO's motion to intervene is granted. Case is remanded to Customs to decide the issues pertaining to copyright infringement pursuant to 28 U.S.C. § 2643(c)(1)(1994).

[Luxury's motion to supplement is denied; ZAO's motion to intervene is granted. Case remanded.]

(Dated September 23, 1999)

Law Offices of Elon A. Pollack (Elon A. Pollack and *Eugene P. Sands)* for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Saul Davis)*, for defendant.

Leboeuf, Lamb, Greene & MacRae, L.L.P. (Melvin S. Schwechter, David P. Sanders and *Julie A. Coletti)* for applicant-intervenors.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, Luxury International, Inc. ("Luxury"), brings this action to contest the denial of a protest and invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1581(a) and (i) (1994).

Luxury filed a protest challenging the United States Customs Service's ("Customs") decision to continue to detain its goods. Luxury's protest was based on its view that ZAO "Elorg" and its exclusive licensee, The Tetris Company, LLC ("Tetris Co.") (collectively "ZAO"), failed to file a timely demand for exclusion and bond pursuant to 19 C.F.R. § 133.43 (1998) and that under the regulations, Customs was required to release its goods.

Customs denied the protest on the grounds that ZAO "Elorg" fulfilled the written demand and bond requirements. Luxury brought suit in this Court to contest the denial of the protest, and ZAO "Elorg" and Tetris Co. moved to intervene in and to dismiss this action.

BACKGROUND

Luxury attempted to import 22,000 LCD hand-held video games ("LCD games") on May 23, 1998 at the port of Los Angeles, California. Customs detained the LCD games pursuant to 19 U.S.C. § 1499. Subsequently, Customs notified Luxury that there was reason to believe that its LCD games were piratical copies of a recorded copyrighted work held by Nintendo of America, Inc. ("Nintendo") for the game "Tetris." In a letter dated July 31, 1998, Luxury denied that the LCD games were copies of a copyright held by Nintendo and also requested that Customs require Nintendo to post a security bond in the amount of $150,000.[1]

In a letter dated September 4, 1998, Customs gave Nintendo notice pursuant to 19 C.F.R. § 133.43 of its detention of the LCD games and of Luxury's denial that the LCD games were piratical copies of any copyrights. Customs notified Nintendo that within 30 days of the notice it would release the LCD games to Luxury unless Nintendo filed both a written demand for exclusion of the LCD games and posted a bond for $150,000 to hold both the port director and the importer harmless from loss or damage as a result of Customs' detention of the LCD games.

On October 2, 1998, ZAO sent a written demand to Customs for exclusion of the imported merchandise pursuant to 19 C.F.R. § 133.43. On October 5, 1998, the demand was received by Customs and ZAO tendered a check to Customs in the amount of $150,000. Customs did not accept the check in lieu of a bond on October 5, but accepted it on October 6, 1998.

On October 8, 1998, Luxury filed a protest with Customs contesting Customs' decision of October 6, 1998 to continue to detain the LCD games, on the ground that the posting of the check was not timely. By letter on October 30, 1998, Customs informed Luxury that there was no merit in its protest because the failure to fulfill the bond requirements of 19 C.F.R. § 133.43(d)(6)(ii) was attributable to Customs' error and the copyright holder could not be held responsible for such error.

Luxury and ZAO allege that on November 12, 1998, ZAO filed a brief with Customs in support of exclusion of the LCD games pursuant to 19 C.F.R. § 133.43(d)(1). Luxury contends that ZAO failed to comply with the notification and certification requirements of 19 C.F.R. § 133.43(d)(1)(i) because ZAO did not provide Luxury with prior notification of the information it submitted to Customs in support of its claim and it did not include with its submission to Customs a written certification that the information had previously been submitted to the importer. ZAO maintains that Luxury did not file any brief in opposition to exclusion and has not participated in Customs' administrative proceed-

[1] Luxury alleges that ZAO "Elorg," a Russian entity, presently holds the trademark and copyright registrations for the Tetris game. Tetris Co. is a ZAO "Elorg" exclusive licensee of the copyright, and it has granted sublicenses to various entities, including Nintendo.

ing to determine whether the LCD games are infringing on ZAO's copyright. On February 12, 1999, Luxury was notified that Customs Headquarters would soon be disposing of the matter. As stated above, Luxury failed to participate in the proceedings and on February 19, 1999, commenced this action in this Court.

In the complaint filed by Luxury, the first cause of action is for a writ of mandamus under 28 U.S.C. § 2643(c)(1). Luxury seeks to compel Customs to release the LCD games and the $150,000 security, alleging that this was the proper course of action under 19 C.F.R. § 133.43(d) because the copyright owner failed to file a timely written demand for exclusion and post a bond.

Luxury's second cause of action is for declaratory relief under 28 U.S.C. § 2643(c)(1). Luxury seeks declaratory judgment that: (1) the copyright owner's demand for exclusion and posting of the security was not timely; (2) Customs had no right to continue to hold the LCD games after October 4, 1998; (3) Customs should immediately release the LCD games to Luxury; and (4) Customs should turn over the $150,000 security to Luxury to compensate it for losses sustained as a result of the detention of the merchandise.

In its third cause of action, Luxury seeks a declaratory judgment which provides that: (1) the requirements of 19 C.F.R. § 133.43(d)(1)(i) are mandatory; (2) Customs may not consider ZAO's brief on infringement because ZAO failed to satisfy the notification and certification requirements of 19 C.F.R. § 133.43(d)(1)(i) and its burden of proof of infringement; (3) Customs should have released the LCD games to Luxury; and (4) Customs should find the LCD games are not infringing copies and direct the port director to release them to Luxury.

On April 21, 1999, ZAO moved for leave to intervene as a party defendant and simultaneously filed a second motion to dismiss Luxury's complaint. On May 6, 1999, Luxury filed its opposition to ZAO's motion to intervene. On May 6, 1999, the government filed its response to ZAO's motion to intervene and cross-motion for joinder of ZAO as a necessary party. In its response and cross-motion, the government consented to ZAO's intervention. On May 20, 1999, Luxury moved for leave to supplement the opposition to ZAO's motion for intervention and also moved to oppose the government's motion for joinder of ZAO as a necessary party. On June 9, 1999, ZAO filed its opposition to Luxury's motion for leave to supplement the record and also moved for leave to file responses to Luxury's motion for leave to supplement and Luxury's opposition to government's motion for joinder of ZAO as a necessary party. Oral argument was heard on July 19, 1999.

DISCUSSION

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994), which provides the Court "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." Section

515 of the Tariff Act, 19 U.S.C. § 1515 (1994 & Supp. III 1997), details the process by which Customs modifies and performs administrative review of its decisions and "provides for the allowance or denial of a protest filed pursuant to section 514 of the Tariff Act of 1930." *Lowa, Ltd. v. United States*, 5 CIT 81, 84, 561 F. Supp. 441, 444 (1983) (citation omitted); *Norfolk and Western Ry. Co. v. United States*, 18 CIT 55, 60, 843 F. Supp. 728, 732 (1994).

Section 514 of the Tariff Act, 19 U.S.C. § 1514 (a)(1994 & Supp. III 1997), provides, in pertinent part, that decisions of Customs relating to "the exclusion of merchandise from entry" are final and conclusive unless a protest is filed "or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade." Thus, under 28 U.S.C. § 1581(a), this Court has the power to hear actions concerning the denial of a protest involving the exclusion of goods from entry into the United States. *See International Maven, Inc. v. McCauley*, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988).

Generally, challenges to entry of merchandise are reviewable in this Court under 28 U.S.C. § 1581(a) once the administrative remedies provided by 19 U.S.C. § 1514 and § 1515 have been exhausted. *See United States v. Uniroyal, Inc.*, 69 CCPA 179, 181, 687 F.2d 467, 470 (1982); *National Customs Brokers and Forwarders Ass'n of America, Inc. v. United States*, 18 CIT 754, 757, 861 F. Supp. 121, 126 (1994). Here, Luxury exhausted its remedies and the Court could properly invoke its jurisdiction under 28 U.S.C. § 1581(a) when Luxury filed a protest with Customs to contest its determination to continue to exclude Luxury's goods, and Customs denied the protest. *See Norfolk*, 18 CIT at 60, 843 F. Supp. at 732; *NEC Elecs. U.S.A. Inc. v. United States*, 13 CIT 214, 218, 709 F. Supp. 1171, 1174 (1989) ("Jurisdiction via 28 U.S.C. § 1581(a) is predicated upon a valid section 1514 protest."); *see also Dornier Med. Sys., Inc. v. United States*, 14 CIT 686, 688–89, 747 F. Supp. 753, 755 (1990).

Although Luxury exhausted its administrative remedies with respect to the protest, it refused to participate in the proceedings commenced by Customs to determine whether the LCD games infringe on ZAO's copyright. Instead of waiting for Customs' determination, Luxury commenced this action contesting the denial of its protest. It is manifest that the gravamen of the allegations before the Court and the relief sought by Luxury concern "the regulations promulgated by [C]ustoms and their administration and enforcement by that agency." *Schaper Mfg. Co. v. Regan*, 5 CIT 266, 268, 566 F. Supp. 894, 896 (1983); *Vivitar Corp. v. United States*, 7 CIT 170, 171–72, 585 F. Supp. 1419, 1422–23 (1984). The Court is empowered to determine whether Customs acted properly in enforcing the regulations pertaining to the exclusion of the LCD games. *See* 28 U.S.C. § 1581(a); *Vivitar*, 7 CIT at 172–73, 585 F. Supp. at 1423; *Schaper*, 5 CIT at 270, 566 F. Supp. at 898. The Court's power is distinct from Customs' power to decide the issue of infringement in a

separate administrative proceeding. *See* 28 U.S.C. § 1581(a); 19 C.F.R. § 133.44 (1998); *Vivitar*, 7 CIT at 172–73, 585 F. Supp. at 1423.

The Court concludes that Luxury has exhausted its administrative remedies with respect to the protest, and the Court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(a).[2] Luxury filed a protest to contest Customs' decision to continue to exclude its goods, and Customs denied the protest. Under the plain meaning of 28 U.S.C. § 1581(a), 19 U.S.C. § 1514 and § 1515, the Court has the power to hear Luxury's complaint regarding Customs' denial of its protest against the continued exclusion of its goods. The Court notes, however, that Luxury prematurely commenced this action without giving Customs the opportunity to determine whether there was an infringement of ZAO's copyright.

II. ZAO's Motion to Intervene

ZAO moves to intervene pursuant to USCIT R. 24(a)(2), which allows a non-statutory absolute right to intervene. *See Vivitar Corp. v. United States*, 7 CIT 165, 166, 585 F. Supp. 1415, 1416 (1984). The relevant portions of USCIT R. 24(a)(2) provide that:

> Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

ZAO argues that it has a stake in the $150,000 it had posted with Customs and in the continued exclusion of the infringing imports. ZAO also claims that it has an interest in seeing that Customs makes an administrative determination of exclusion and claims a right to contest the allegations of untimely filing of documents and other events in the administrative proceedings.

Luxury, on the other hand, argues that ZAO's ability to seek to exclude the merchandise will not be impaired because 19 C.F.R. § 133.43(e) provides the means to obtain an injunction as an alternative to the administrative procedure. Luxury claims that ZAO can still pursue this alternative avenue even if Luxury was to prevail in the present action. In addition, Luxury contends that ZAO only has a contingent interest in the $150,000 security it had posted with Customs, since any right the copyright owner claims in the security is contingent upon Customs' determination that the merchandise is infringing on ZAO's copyright. Finally, Luxury contends that the government can adequately represent ZAO's interest since the government has an interest in adequately defending its interpretation of its own rules.

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[2] Luxury claims that the Court has jurisdiction under both 28 U.S.C. § 1581(a) and (i). Because the Court has jurisdiction over the action pursuant to 28 U.S.C. § 1581(a), reliance on § 1581(i) is inappropriate. *See Miller & Co. v. United States*, 5 Fed. Cir. (T) 122, 124, 824 F.2d 961, 963 (1987); *United States v. Uniroyal, Inc.*, 69 CCPA 179, 183–84, 687 F.2d 467, 472 (1982).

Luxury moved to supplement its opposition to ZAO's motion for intervention. In its supplemental pleading, Luxury disputes the ownership of the copyright at issue. The rule pertaining to supplemental pleadings, USCIT R. 15(d), provides that "[u]pon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

The Court declines to address the supplemental pleading which contains Luxury's arguments about the ownership of the copyright. Luxury has set forth no reason why it could not have made those arguments in its original opposition to ZAO's intervention. Luxury does not contend that the information on which it bases its arguments was not available at the time it made its original opposition to ZAO's intervention; Luxury merely states that it discovered the information later rather than sooner. The clear mandate of the rule is that a supplemental pleading may be permitted in order to set forth "transactions or occurrences or events which have *happened* since the date of the pleading sought to be supplemented," not transactions or events which have been *discovered* since the date of the pleading sought to be supplemented. USCIT R. 15(d) (emphasis added). The Court, therefore, denies Luxury's motion to supplement its opposition to ZAO's motion for intervention.

The Court will address each of the arguments for intervention in turn. First, ZAO does indeed have a stake in the present proceeding. Pursuant to 19 C.F.R. § 133.43(b)(6)(ii), ZAO posted the $150,000 security to commence Customs proceedings against Luxury to ensure that products which may infringe on its copyright do not enter the United States. ZAO has a direct and concrete interest in seeing that the merchandise continues to be excluded. Therefore, ZAO has a stake in the present proceeding in protecting its copyright and the $150,000 security it has posted with Customs.

Second, ZAO "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest." USCIT R. 24(a)(2). If Luxury's products are allowed to enter the United States, ZAO will lose the security it has posted and products which ZAO alleges infringe on its copyright may be released into the stream of commerce in the United States, possibly affecting the reputation of ZAO's products. Luxury's suggestion that ZAO file for a preliminary injunction as an alternative to the administrative procedure is not viable. It is true that if ZAO is not allowed to intervene any decision made here would not be binding on ZAO, and ZAO could commence another action. In ZAO's absence, however, the Court would not be able to grant relief to all the interested parties and would be forcing ZAO to commence other suits that involve the same issues to decide matters that can be resolved here. The practical effect of barring ZAO's intervention is to force ZAO to file other suits to protect its interest. ZAO could, for example, file an action for a preliminary injunction or a civil action to contest the merits

of the substantive issues such as Customs' failure to accept the check in lieu of a bond on October 5, 1998. The rule does not require ZAO to jump through hoops imposed by Luxury in order to protect its interest. The fact remains that barring ZAO's intervention may impair its ability to protect the reputation of its goods and the security it has posted with Customs.

Finally, the Court finds that ZAO's interest will not be adequately represented by the government in the original action. As stated above, ZAO's security is at stake as is the reputation of its products. This is quite different from the government's interest in seeing that its regulations are properly interpreted and applied. To illustrate this point, the Court notes that it is possible that a proper interpretation of the government regulations could yield a result contrary to ZAO's interest.

Because ZAO has satisfied the criteria for non-statutory intervention as of right under USCIT R. 24(a)(2), the Court grants its motion to intervene.[3] Accordingly, the Court concludes that it is not necessary to consider the issues pertaining to statutory intervention as of right pursuant to USCIT R. 24(a)(1) nor permissive intervention pursuant to USCIT R. 24(b). *See Sumitomo Metal Indus., Ltd. v. Babcock & Wilcox Co.*, 69 CCPA 75, 81, 669 F.2d 703, 707 (1982). The Court remands the matter to Customs to allow Customs to determine administratively whether there is an infringement of ZAO's copyright.

CONCLUSION

For the foregoing reasons, the Court concludes that the plaintiff may not supplement its pleading. The Court also concludes that applicant-intervenors should be permitted to intervene. Finally, pursuant to 28 U.S.C. § 2643(c)(1)(1994), the Court orders Customs to decide the issues pertaining to copyright infringement.

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[3] Because ZAO "Elorg" and Tetris Co.'s motion to intervene is granted, the Court finds that it is not necessary to address the government's cross-motion to join ZAO "Elorg" and Tetris Co. as necessary parties and the responsive papers thereto.

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